Supreme Court, U.S.
FILED

981606 DEC 15 1998

OFFICE OF THE CLERK

No.

# IN THE SUPREME COURT OF

# THE UNITED STATES

October Term, 1998

CHUCK DUNN, Petitioner

vs.

THE COMMISSION ON PROFESSIONAL COMPETENCE, Respondent, [JURUPA UNIFIED SCHOOL DISTRICT, SANDRA RUANE, MARY BURNS, HOLLY HANKE, JOHN CHAVEZ and SAM KNIGHT, Real Parties In Interest]

## PETITION FOR CERTIORARI

CHUCK DUNN
In Pro Se
4881 Brookhill Terrace
Riverside, CA 92509
909/688-3401

41pp

## Questions Presented

1. Did the District violate Chuck Dunn's First Amendment rights by firing him in part for protected speech?
   a) Was Dunn's speech and memos that resulted in a newspaper article of some public interest?
   b) Did the District show sufficient disruption of the educational process to justify suppressing Dunn's speech?
2. Did the District violate Dunn's First Amendment rights by firing him in part for First Amendment protected activity?
   a) Was Dunn's First Amendment protected activity a substantial factor in the District's decision to fire him?
   b) Did the District prove it would have taken the same decision in the

absence of Dunn's protected First Amendment activity?

c) Should Dunn have been allowed to present evidence his First Amendment protected activity was a " substantial factor" in the District's decision to fire him including the lax manner the District handled similar and worse allegations against politically favored teachers including actually molesting students?

d) Did the California Court of Appeal err in deciding Dunn's First Amendment rights were not violated because the Commission on Professional Responsibility decided there was good cause for firing Dunn?

3. Does the independent review standard in Bose Corp. v Consumers Union etc. (1984) 466 U.S. 485, 499; 104 S.Ct. 1949, 1958; 80 L.Ed.2d 502, apply in mixed motive cases under Mt. Healthy etc. v. Doyle (1977) 429 U.S. 274, 287; 97 S.Ct. 568,576; 50 L.Ed.2d 471?

4. Must the government show actual disruption of its operations before it can suppress its employees' speech?

5. Was Dunn fired in violation of due process of law?

   a) Did the District and/or the Commission on Professional Competence violate Dunn's due process rights by firing him in part for conduct that did not violate any law, rules, regulations, policy, or orders of his superiors, and which he engaged

in openly for years without objection?

b) Did the District and/or Commission on Professional Responsibility violate Dunn's due process rights by firing him for uncharged alleged misconduct after the Administrative Law Judge running the Commission hearing said seven times he was only concerned whether the written Charges were true and after the District specifically refused the chance to amend its Charges?

## Parties to the Proceeding Below

Chuck Dunn

Jurupa Unified School District

("District")

Commission on Professional Competence

("Commission")

(The Commission was an ad hoc administrative tribunal consisting of an Administrative Law Judge (ALJ), and two teachers that originally heard and tried the case. The District is the real party in interest.)

## Table of Contents

Questions Presented. . . . . i

Parties To The Proceeding Below. . . . . vi

Table of Contents. . . . . vi

Table of Authorities. . . . . .viii

The Opinions Below. . . . . 1

Jurisdiction. . . . . 1

Constitutional Provisions Involved. . . . . 2

Statement of the Case. . . . . .2

Brief Factual Background. . . . . 2

The Legal Proceedings. . . . . .7

Reasons for Granting Certiorari. . . . . .9

First Amendment. . . . . .9

A. Speech Held Protected And/Or Of Public Concern Under the Two Step Test for Public Employee Free Speech. . .11

B. The Government Should Be Required To Show Actual Disruption Before Suppressing Its Employees' Speech. . . . 13

C. Standard Of Review In First Amendment Cases. . . . . 15

D. Dunn's Memos and Speech Were Protected. . . . . 18

E. Dunn's First Amendment Protected Activities Were A Substantial Factor In The District's Decision To Fire Him. The District Did Not Prove It Would Have Taken The Same Action In The Absence Of Dunn's First Amendment Protected Activities. . . . . .19

F. Summary Re: First Amendment Issues. . . . . .24

Due Process. . . . . 24

A. Insufficient Notice the Conduct was Prohibited. . . . . .24

B. Amending the Charges After the Hearing. . . . . 25

Conclusion. . . . . .29

## Table of Authorities

FEDERAL CASES:

Board of County Commissioners v. Umehr
(1996) 518 U.S. 668; 116 S.Ct. 2342;
135 L.Ed.2d 843. . . . . .18,24

Boutilier v. Immigration Service
(1967) 387 U.S. 118, 87 S.Ct. 1563,
95 L.Ed. 886. . . . . .25

Bose Corp. v. Consumers Union of U.S. Inc.
(1984) 466 U.S. 485; 104 S.Ct. 1949;
80 L.Ed.2d 502. . . . . .10,15-17

Brasslett v. Cota
(1st Cir.1985) 761 F.2d 827. . . . . 13,15,17

Connally v. General Const. Co.
(1926) 269 U.S. 385; 46 S.Ct. 126;
70 L.Ed. 322. . . . . .25

Connick v. Myers
(1983) 461 U.S. 138; 103 S.Ct. 1684;
75 L.Ed. 708. . . . . 11,14

Commissioners v. Umbehr
(1996) 688 U.S. 668; 116 S.Ct. 2342;
135 L.Ed.2d 843. . . . . .18,24

Germann v. City of Kansas City
(8th Cir.1985) 776 F.2d 761. . . . . 14

Givhan v. Western Line Consol. S.D.
(1979) 439 U.S. 410; 99 S.Ct. 693;
58 L.Ed.2d 619. . . . . .11

Hall v. Marion School Dist. No. 2
(4th Cir.1994) 31 F.3d 183. . . . . .16

Hess v. Indiana
(1973) 414 U.S. 105; 94 S.Ct. 326;
38 L.Ed.2d 303. . . . . .16

Hyland v. Wonder
(9th Cir.1992) 972 F.2d 1129. . . . . .13

Johnson v. Multnomah County
(9th Cir.1995) 48 F.3d 420. . . . . .13

Mathews v. Eldridge
(1976) 424 U.S. 319; 96 S.Ct. 893;
47 L.Ed.2d 18. . . . . 28

McDonnell Douglas Corp. v. Green
(1973) 411 U.S. 792, 93 S.Ct. 1817,
36 L.Ed.2d 668. . . . . .20

McKinley v. City of Eloy
(9th Cir.1983) 705 F.2d 1110. . . . . .13

McMullen v. Carson
(11th Cir.1985) 754 F.2d 936. . . . . .14,15,17

Miller v. California
(1973) 413 U.S. 15; 93 S.Ct. 2607;
37 L.Ed.2d 419. . . . . .17

Monsanto v. Quinn
(3d Cir.1982) 674 F.2d 990. . . . . .13,16,17

Mt. Healthy etc. v. Doyle
(1977) 429 U.S. 274; 97 S.Ct. 568;
50 L.Ed.2d 471. . . . . .10,15,20

Pickering v. Board of Education
(1968) 391 U.S. 563; 88 S.Ct. 1731;
70 L.Ed.2d 811. . . . . .9,16

Rankin v. McPherson
(1987) 483 U.S. 378; 107 S.Ct. 2891;
97 L.Ed.2d 315. . . . . 11-13

Standing Committee etc. v. Yagman
(9th Cir.1995) 55 F.3d 1430. . . . . 12,14,18

Street v. New York
(1969) 394 U.S. 576; 89 S.Ct. 1354;
22 L.Ed.2d 572. . . . . .16

Waters v. Chaffin
(11th Cir.1982) 682 F.2d 833. . . . . 11,12

Waters v. Churchill
(1994) 511 U.S. 661; 114 S.Ct. 1878;
128 L.Ed.2d 686. . . . . 14

Voight v. Savell
(9th Cir.1995) 70 F.3d 1552. . . . . 13

Zamboni v. Stamler
(3rd Cir.1988) 847 F.2d 73. . . . . 12,13

CALIFORNIA CASES[1]:

Chico Police etc. v. Chico
(1991) 232 Cal.App.3d 635. . . . . 18

Harry Carian Sales v. A.L.R.B.
(1985) 39 Cal.3d 209; 216 Cal.Rptr 688. . . .28

---

1 Dunn offers these California cases as persuasive authority.

Heard v. Lockheed etc.
(1996) 44 Cal.App.4th 1735;
52 Cal.Rptr.2d 620. . . . . .21

Morrison v. State Board of Education
(1969) 1 Cal.3d 214; 82 Cal.Rptr. 175. . . .25

U.S. CONSTITUTION

AMENDMENT I. . . . . 2,7-24

AMENDMENT XIV. . . . . 2,8,9,24,27,28

U.S.C.

28 U.S.C. §1257(a). . . . . 1

## The Opinions Below

The Commission issued its decision April 21, 1995. (A:1)[1] Dunn then filed a petition for writ of mandate with the Superior Court of Riverside County, California. The petition was denied June 26, 1996. (A:84) On September 16, 1996, the Superior Court denied Dunn's motion for new trial based on one of the District's witnesses recanting all of her testimony and claiming the District paid her to testify against Dunn. (A:112,142-143)

Dunn appealed to the California Court of Appeal. It issued its decision June 5, 1998. (A:92) The California Supreme Court denied review September 16, 1998. (A:148)

## Jurisdiction

This Court has jurisdiction under to review the above decisions under 28 U.S.C. §1257(a).

---

[1] Appendix page 1.

## Constitutional Provisions Involved

U.S. Constitution, Amendment I

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Constitution, Amendment XIV, Section 1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## Statement of the Case

Brief Factual Background[2]

This case involves dismissing an unquestionably "eccentric" but "superb"

---

[2] Dunn's briefs included cites to the record for all of these facts. The cites are not included because there is only a very limited record with this petition.

teacher, an "unconditional teacher," as in "unconditional love." The Commission found "a teacher of respondent's abilities is a tremendous community resource." (D.6;A:54)[3] and:

> "A parade of witnesses - respondent's former students, their parents, his colleagues, and law enforcement officers - testified regarding respondent's unquestioned skills as a teacher, his powerful sway over youth, and his positive influence in the community." (F.47,¶1;A:41)[4]

Part of Dunn's success as a teacher was due to close, friendly and mentoring relationships with the students, (and not just his), in and out of school. He helped them with homework, counseled them on personal and family problems, took them on trips for rafting, gold mining, rattlesnake hunting, shopping, and he lent significant sums of money, Garret Adair $4000 and Richard Ortiz $2000 as examples. No

---

[3] Commission Determination 6.

parents or school officials ever objected to this conduct or advised him not to do it. The District had no rules or policies governing teacher student contact outside of school.

Dunn was also very politically active. (F.4,A:5-10) He helped form a political action committee that replaced three school board members and later elected one of Principal Young's "greatest nightmares" to the board. This greatly upset some in the administration. Dunn and his students suffered years of disparate treatment because of his political activities.

In October 1993, Nancy Woo, a 17 year old student, alleged Dunn was sexually harassing and stalking her. While the District had a long history of lax treatment of teachers accused of similar and worse misconduct including actual molestation, it jumped on

---

[4] Commission Finding 47.

Nancy's charges and fired Dunn without giving him a meaningful chance to respond. A former board member stated by declaration he never saw the District fire a teacher accused of misconduct that did not result in felony charges, (A:187), and there were none here.

The District relied on Nancy, a "known flaky student," Aaron, her admitted LA gang member boyfriend, and "Mandy."

The District also used Dunn's intemperate memos (including A:167) to Principal Young (regarding a budget dispute and perjury by teacher Tieri to protect teacher Hite on sexual battery charges) and giving the memos to a reporter for an article (F.11,A:18-19;A:182). The Charges are at A:149.

The Commission found all of the sexual harassment and stalking allegations were false. (F.21,36,46,A:25,35-36,41) Dunn was trying to

help Nancy and was genuinely concerned about her, like other students. (F.20-21,A:24-25)

After the case was submitted and the District declined to amend the Charges, the Commission amended the Charges. It upheld his dismissal finding his close but purely platonic relationship with Nancy allegedly without her parents' knowledge was immoral and dishonest. (D.1,3,A:43,48) Young testified Nancy's parents were aware they were spending time together. The District did not call her parents to testify. Dunn talked to her parents 8 or 9 times including once when her mother called and asked where they were going. {U}[5]

Mandy signed a declaration recanting all of her testimony against Dunn and claiming the District paid her to testify against Dunn. Mandy previously changed her story so many times the Court of Appeal said of her last

[5] {U} this evidence was undisputed.

recantation it was merely cumulative.(A:145) Before making her allegations, Nancy told coordinator Garcia "I'm mad at Mr. Dunn. I am going to get him in trouble." Nancy testified she "resented" Dunn for acting like her father by checking on her academic progress. Dunn's summary of Nancy's, Aaron's and Mandy's lies, inconsistencies and constantly changing allegations runs 40 single spaced pages.[6]

The Legal Proceedings

Please see "Opinions Below". Dunn contended from the Commission hearing on that his memos and speech were First Amendment protected and his political activities were a "substantial factor" in the District firing him.[7] Most of

---

[6] This petition can only contain a summary of the evidence. The Commission hearing lasted 10 days, with 39 witnesses plus 2 depositions and 81 exhibits. The reporter's transcript is 1995 pages. Dunn's appendix to the Court of Appeal is 1107 pages. Dunn's summary of the evidence filed with the Superior Court is 94 pages.

[7] D.5,A:49; A:88¶4:A:135; P&A filed w/ the Commission, Exb.75; Dunn's brief supporting his petition for writ of mandate p.32. The District did not contend Dunn failed to properly raise any of these First Amendment issues.

Dunn's evidence that his political activities were a "substantial factor" was excluded. The Commission and Superior Court ruled Dunn's First Amendment rights were not violated because the issues that resulted in a newspaper article was not of any public interest. They did not rule on the "substantial factor" issue. (D.5,A:49-53;88¶4) The Court of Appeal held Dunn's First Amendment rights were not violated because the Commission found good cause to fire him. (A:137)

The due process issues arose when the Commission upheld Dunn's firing based on uncharged misconduct he had engaged in for years without objection and that violated no laws, rules, or policies or directives after the ALJ said seven times he was only interested in whether the written Charges were true and the District refused the chance to amend its

charges. Dunn raised the due process issues from the Superior Court level on.[8]

**Reasons for Granting Certiorari**

**FIRST AMENDMENT**

First Amendment rights are among our most precious. Pickering v. Board of Ed. (1968) 391 U.S. 563, 572; 88 S.Ct. 1731, 1736; 70 L.Ed.2d 811:

> "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."

The public should not have to depend on official government spokespersons for information. Few if any employees will risk their jobs to the save the taxpayers' money.

The Commission and California courts decided this case contrary to the Constitution and this

---

[8] A:88,¶5;A:127-129; P&A filed w/ the Commission, Exb.75; Dunn's brief supporting his petition for writ of mandate p.6,47. The District did not contend Dunn failed to

Court's decisions, in particular Mt. Healthy etc. v. Doyle (1977) 429 U.S. 274, 287; 97 S.Ct. 568, 576; 50 L.Ed.2d 471. There is also disagreement among Federal Courts of Appeal and this Court regarding following issues. First, does the independent review standard in Bose Corp. v Consumers Union etc. (1984) 466 U.S. 485, 499; 104 S.Ct. 1949, 1958; 80 L.Ed.2d 502 apply in mixed motive cases under Mt. Healthy? Second, must the government show actual disruption before it can suppress its employees' speech or can the government manager say: " I think the speech was probably going to interfere with office operations or close working relationships?"

Dunn also offers the District's attorney's letter to the Court of Appeal explaining why the case is of such public importance. (A:177)

---

properly raise any of these due process issues.

A. Speech Held Protected And/Or Of Public Concern Under the Two Step Test for Public Employee Free Speech

There is a two step test for public employee First Amendment rights. First, is the speech on a matter of " public concern?" Connick v. Myers (1983) 461 U.S. 138, 146; 103 S.Ct. 1684; 75 L.Ed.2d 708. Second, the Court must balance the employee's free speech interest against the state's interest as employer. The state bears the burden of justifying the discharge. Rankin v. McPherson (1987) 483 U.S. 378, 388; 107 S.Ct. 2891, 2899; 97 L.Ed.2d 315.

"Great secular causes, with smaller ones, are guarded." Connick, supra at 147, 1684,1690. "The First Amendment's protections do not turn on the social worth of the statements." Waters v. Chaffin (11th Cir.1982) 682 F.2d 833, 837. The First Amendment protects speech in public and private. Givhan v. Western Line Consol.

S.D. (1979) 439 U.S. 410, 415-416;99 S.Ct. 693, 695; 58 L.Ed.2d 619. Protected speech can be caustic and controversial. Rankin, supra at 387, 2898:

> "The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern. '[D]ebate on public issues should be uninhibited, robust and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" (Emphasis added)

Rankin, supra at 381, 2895, [employee stated after attempted presidential assassination: "if they go for him again, I hope they get him," protected (386,2898)]; Zamboni v. Stamler (3rd Cir.1988) 847 F.2d 73, 78, [changes in personnel policies and procedures, of public interest]; Waters, supra at 834, 837, [off duty officer calling the police chief a "bastard" and "back stabbing son of a bitch," protected]; Standing Committee v. Yagman (9th Cir.1995) 55 F.3d 1430, 1440,1443 [calling a judge

"dishonest," a "buffoon," a "substandard human," and a "right wing fanatic," protected]; Voight v. Savell (9th Cir.1995) 70 F.3d 1552, 1560, [personnel disputes, of public concern].

B. The Government Should Be Required To Show Actual Disruption Before Suppressing Its Employees' Speech

Cases requiring actual disruption: Zamboni, supra at 79; Johnson v. Multnomah County (9th Cir.1995) 48 F.3d 420,427; Hyland v. Wonder (9th Cir.1992) 972 F.2d 1129,1140 ["actual, material and substantial disruption must be demonstrated"]; McKinley v. City of Eloy (9th Cir.1983) 705 F.2d 1110, 1115 ["real not imagined disruption is required"] Monsanto v. Quinn (3d Cir.1982) 674 F.2d 990, 997 ["no evidence of any substantial disruption"]; Brasslett v. Cota (1st Cir.1985) 761 F.2d 827, 845 ["operational efficiency objections must be real and important"]; Rankin, supra at 378,

2899, ["there is no evidence that [the speech] interfered with the efficient functioning of the office"].

Cases not requiring actual disruption: Yagman, supra at 1443, [attorney comments may be sanctioned "only if they pose a clear and present danger to the administration of justice"]; McMullen v. Carson (11th Cir.1985) 754 F.2d 936, 939 ["serious conflict was almost certain to occur" because a deputy sheriff was a KKK member]; Germann v. City of Kansas City (8th Cir.1985) 776 F.2d 761, 765 [comments made after employee strike and amidst great turmoil in agency]. Some language in Connick v. Myers supra 461 U.S. at 152; 103 S.Ct. at 1692-1693; and Waters v. Churchill. (1994) 511 U.S. 661, 674; 114 S.Ct. 1878, 1887; 128 L.Ed.2d 686 suggests actual disruption may not be required. However, the Court stated:

> "And a government employee, like any citizen, may have a strong, legitimate

> interest in speaking out on public matters. In many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished." (Emphasis added) Id. at 674; 114 S.Ct. at 1887

Resolving this important issue will increase uniformity of decision, and if resolved the right way, protect First Amendment rights.

C. Standard Of Review In First Amendment Cases

Bose Corp. v Consumers Union etc., supra, 466 U.S. 485, 499; 104 S.Ct. 1949, 1958; 80 L.Ed.2d 502:

> "In cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression."

In addition to Bose, the following cases support independent review on the Mt. Healthy "substantial factor" issues: McMullen v. Carson, supra, 754 F.2d 936, 938; Brasslett v. Cota, supra, 761 F.2d 827, 840; Monsanto v.

Quinn, supra, 674 F.2d 990, 996, fn. 10; and Pickering, supra at 578-579; 1740.

Holding against independent review: Hall v. Marion School Dist. No. 2 (4th Cir.1994) 31 F.3d 183, 193.

Many other First Amendment factual issues receive independent review:

1) Whether defamatory statements were made with actual malice. Bose, supra; 466 U.S. at 508; 104 S.Ct. at 1963.

2) Whether words are "'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.'" Street v. New York (1969) 394 U.S. 576, 592, 89 S.Ct. 1354, 1365, 22 L.Ed.2d 572; Bose, supra, at 505; 104 S.Ct. at 1962.

3) "'Whether advocacy is directed to inciting or producing imminent lawless action.'" Hess v. Indiana (1973) 414 U.S. 105, 108-109, 94

S.Ct. 326, 328-329, 38 L.Ed.2d 303; Bose, supra, at 505-506; 104 S.Ct. at 1962.

4) Whether alleged pornography appeals to "prurient interest" and is "patently offensive" under community standards. Miller v. California (1973) 413 U.S. 15, 93 S.Ct. 2607; Bose, supra, at 506; 104 S.Ct. at 1963

5) Whether statements were recklessly false. Brasslett, supra, at 842-844.

6) "Numerous findings of fact regarding the nature of the Klan and plaintiff's relationship to it." McMullen, supra, at 938.

7) Whether the employee's letters caused "substantial disruption;" Monsanto, supra, at 997, or whether statements caused "actual and significant harm." Brasslett, supra, at 845-846.

8) Whether an attorney's statements interfered with the administration of justice.

Standing Committee etc. v. Yagman, supra, 55 F.3d 1430, 1443.

The possible burden on the courts is secondary to First Amendment rights. County Commissioners v. Umbehr (1996) 688 U.S. 668, 681, 116 S.Ct. 2342, 2350, 135 L.Ed.2d 843.

The Court of Appeal did not use independent review nor rule whether it should. (A:135-138)

D. Dunn's Memos and Speech Were Protected

Dunn's speech and memos were of some public concern, as opposed to "matters of only personal interest" and of "no relevance" to the public's evaluation of [the school or district]." Chico Police etc. v. Chico (1991) 232 Cal.App.3d 635, 644. Dunn's memos resulted in the newspaper article. (A:182)

The issues in Dunn's memos (App.167) are: the budget issue, public employee free speech rights, Young's good friend Huckaby's dismissal from a high level position at a local college,

how the District handled sexual misconduct allegations against teacher Hite, Tieri's possible perjury in Hite's criminal trial, (the reference to "an innocent young girl"), excessive force allegations against a principal, public employee First Amendment rights, and Young's failure to follow the accounting directive. The budget dispute was not merely over $150 for Dunn's students, it was over wasteful "use it or lose it" budgeting.

There was no showing or finding of any disruption. (D.5,A:49-53;88¶4;135-138)

E. Dunn's First Amendment Protected Activities Were A Substantial Factor In The District's Decision To Fire Him. The District Did Not Prove It Would Have Taken The Same Action In The Absence Of Dunn's First Amendment Protected Activities

See Mt. Healthy, supra. The Court of Appeal erred by holding the Commission found good cause to fire Dunn, not whether the District would have fired him in the absence of First Amendment conduct. (A:137)

Most of Dunn's evidence on this issue was excluded, (D.5,A:49-53; A:90¶8; A:135-142), in particular, the lax manner the District handled similar and worse allegations against politically favored teachers including molestation cases.

However, Dunn contends the limited evidence admitted raises a prima facie case of disparate treatment based on his First Amendment protected activities. By analogy to discrimination cases, see McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 804, 93 S.Ct. 1817, 36 L.Ed.2d 668, [treatment of misconduct by white employees is "especially relevant"]. As in discrimination cases, the

issue is the employer's motive. Heard v. Lockheed etc. (1996) 44 Cal.App.4th 1735, 1751, 52 Cal.Rptr.2d 620, [showing prima facie case of disparate treatment not onerous, "very little" evidence needed].

The evidence admitted on this issues includes:[9] Young wanted to fire Dunn in January 1993, and complained about Dunn's political activities, (A:174)// Young was concerned Dunn had the political influence to have him fired// prior attempt to solicit false allegations against Dunn// Mrs. Darby: "They're out to get you. You had better watch out."// Dunn's and Vice Principal Moore's undisputed testimony of disparate treatment dating back to 1989// fn.4,A:10// sexual misconduct complaints against Hite "shoved on the back burner"// problem of students making false sexual harassment allegations against other teachers

---

[9] While the record accompanying this Petition is limited,

(A:176)// Young did not give Dunn a meaningful opportunity to respond to the Charges, as he did with Lorenz, who was accused of molesting students// [defense $ solicited at staff meetings for teacher accused of molestation// the massive inconsistencies in Nancy's, Aaron's and Mandy's stories were there if anyone looked// the District avoided gathering any evidence favorable to Dunn including not asking coordinator Garcia what Nancy told him[10]// Young could not recall if he asked if Mr. Woo could confirm any of Nancy's charges// Mr. Woo said " he observed some problem Nancy had with lying and not telling the truth." Young passed on other information he received in 3-5 interviews with Nancy to the District's attorneys, Young did not recall if he passed on that information// " selective discipline" // " Skelly" hearing Monday morning after

---

evidence of all of the following facts is in evidence.

[10] Garcia testified Nancy said "I'm mad at Mr. Dunn. I'm

Thanksgiving, notice mailed Tuesday before Thanksgiving// when District fired Dunn, it did not have a single signed declaration from Nancy et al.// coordinator Pina extensively involved despite testifying it was a student staff problem outside of her responsibility// Nancy's undeserved " A" in PE// paying Mandy to testify// Young said after Nancy made her charges:

> " 'I have finally achieved my greatest contribution toward education, Mr. Dunn is either 'history,' or he's something to that effect.' "

Even without the evidence showing worse allegations against other teachers were handled much more leniently, and Heck's declaration (A:187), the evidence suggests more going on in Dunn's case than trying to rid the school of any sexually oriented teacher misconduct.

There was no evidence or findings the District would have made the same decision in

---

going to get him in trouble."

the absence of Dunn's First Amendment activities. Dunn submits the District failed to prove that if the same "known flaky student"[11] made the same allegations against a politically favored teacher, like Lorenz, the District would have fired him.

F. Summary Re: First Amendment Issues

Dunn contends independent review shows his speech and memos were protected, and he was really fired for exercising his First Amendment rights. Resolving these First Amendment issues and protecting Dunn's right to speak out will benefit all government agencies and employees, and protect the public's right to know. County Commissioners v. Umbehr, supra, 518 U.S. at 674, 116 S.Ct. 2347.

**DUE PROCESS**

A. Insufficient Notice the Conduct was Prohibited. Civil and criminal statutes must

[11] So testified guidance coordinator Ernie Garcia.

provide fair notice. Connally v. General Const. Co. (1926) 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322; Boutilier v. Immigration Service (1967) 387 U.S. 118, 123, 87 S.Ct. 1563, 1566, 95 L.Ed. 886. Morrison v. State Board of Education (1969) 1 Cal.3d 214, 231; 82 Cal.Rptr. 175.

Regarding Dunn's close but purely platonic relationship with Nancy, Dunn openly engaged in similar relationships with male and female students for years. These relationships did not violate any laws, rules, policies, or directives from his employer. He was never counseled or advised against same.

B. Amending the Charges After The Hearing.

Dunn was also entitled to notice of and opportunity to rebut the Charges. Mathews v. Eldridge (1976) 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18. The District declined the opportunity to amend its Charges at the hearing. The ALJ said seven times the

Commission was only interested in whether the Charges were true. The Commission found most of the Charges were false but fired Dunn based in large part on uncharged misconduct. Dunn and his attorney did not know what alleged misconduct he was being fired for until they received the Decision.

This new alleged misconduct is: F.22,47,D.1;A:25,41,43, (re allegedly spending a great deal of time alone with Nancy without her parents' knowledge. The Charges allege only that her parents did not know they sometimes ate at restaurants. (Chg.6,A:152; F.25,A:28) However, one of the major grounds for the Decision was Dunn supposedly concealed his relationship with Nancy from her parents.[12] F.30;A:32, (the Sciortino trip) could have been

[12] When Pina, Young and the District's attorneys interviewed Nancy multiple times over the one month from when Nancy making her first set of charges to sending Dunn the Charges, did they really ask Nancy if her parents knew about their eating together on the shopping trips and not ask if her parents knew about the shopping trips?

evidence of Dunn's supposed undying love for Nancy. The Commission found it was an independent instance of misconduct. F.27;A:29, (the insurance) Dunn was charged with adding Nancy to his insurance. In Charges, the insurance was a minor issue. The Commission made it a major issue and found Dunn guilty of dishonesty with his insurance company. This evidence was brought in the last afternoon of the hearing on rebuttal. Dunn could not gather contrary evidence.[13] F.41;A:37, (referring Mandy to his attorney after which Mandy changed her declaration exculpating Dunn)[14]. F.43;A:38, (attempting to improperly influence Mandy's testimony and Mandy being "concerned" about Dunn's "influence over her associates")

---

[13] Dunn's ins. co. deleted Nancy retroactively to the date she was added, and did not charge him any premium increase.

[14] Her original declaration, not the one she latter signed recanting all of her testimony and claiming the District paid her to testify against Dunn. (While it was not raised as a due process issue below, does paying Mandy to testify and then firing Dunn based on her testimony

F.48;A:42, (not respecting the proceeding, attempting to influence unnamed witnesses, etc.). F.31;A:33, (allegedly telling Mandy to call Aaron and tell him 2 men were watching his home) is different than (Chg.23;A:158). The District alleged Dunn "admitted" to Mandy he asked 2 men to watch Aaron's home and "mentioned" the men were carrying guns. Per Chg.24, the men were there. Aaron and his cousin (who did not testify) saw them, but not the Commission. (F.31,36,37; A:33-36)

This case is similar to Harry Carian Sales v. A.L.R.B. (1985) 39 Cal.3d 209, 216 Cal.Rptr 688, [employer found guilty of the charged unfair labor practices and additional rather closely related, but uncharged, unfair labor practices. This was "contrary to elementary constitutional principles of procedural due

---

violate due process?)

process and must be set aside." Id. at 252. The Court explained:

> "Even if the incidents had been said to be intertwined with those charged in the complaint, petitioner had no way of fathoming whether Carian's conduct on these two occasions was merely being considered as a factor in setting aside the election or as unfair labor practices in and of itself." Id. at 251.

The Court of Appeal ruled Dunn could be fired for the unalleged misconduct because he did not object to the evidence. (A:136) However, the evidence was relevant to the alleged misconduct. For example, the alleged conversations with his insurance agent were relevant to showing Dunn added Nancy to his insurance. The Commission then found Dunn was dishonest with the insurance company. (F.27,A:29)

**Conclusion**

Dunn respectfully submits by granting certiorari, the Court can resolve many important issues and increase uniformity of

decision. The Court can provide public employees the necessary breathing room to keep the public informed. The Court can also, at long last, do justice for this "superb" teacher wrongfully fired for political reasons.

Dated: March 30, 1999

CHUCK DUNN, Pro Se

(2)

Supreme Court, U.S.
FILED

981606 DEC 15 1998

OFFICE OF THE CLERK

No.

**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 1998

CHUCK DUNN, Petitioner

vs.

THE COMMISSION ON PROFESSIONAL COMPETENCE, Respondent,
[JURUPA UNIFIED SCHOOL DISTRICT, SANDRA RUANE, MARY BURNS, HOLLY HANKE, JOHN CHAVEZ and SAM KNIGHT, Real Parties In Interest]

**APPENDIX TO PETITION FOR CERTIORARI**

CHUCK DUNN
Pro Se
4881 Brookhill Terrace
Riverside, CA 92509
(909) 688-3401

18968

## CONTENTS OF APPENDIX

DECISION OF THE COMMISSION ON PROFESSIONAL COMPETENCE . . . . . 1

STATEMENT OF DECISION (and order) (of the Superior Court). . . . . 84

OPINION (of the Court of Appeal). . . . . .92

ORDER DENYING REVIEW (by the California Supreme Court). . . . .148

STATEMENT OF CHARGES. . . . . 149

EXHIBIT 16 (Dunn's memo to Alan Young, 4/30/93). . . . . 167

EXHIBIT 18 (Young's memo complaining Dunn is distributing a petition in his store and asking if Dunn could be fired, 1/27/93). . . . . 174

EXHIBIT 21 (Minutes of Principal's Cabinet Meeting complaining about the problem of false sexual harassment allegations, 4/6/93). . . . . 176

Letter from the District's attorneys asking the Court of Appeal to publish its decision because the issues are of such interest to the public, school districts and teachers. . . . . 177

EXHIBIT 59 (Newspaper article re: the budget dispute based on information Dunn provided the reporter, 9/15/93). . . . . .182

DECLARATION OF BILL HECK. . . . . 187

THE GOVERNING BOARD OF THE JURUPA UNIFIED SCHOOL DISTRICT

In the Matter of the Accusation Against:

CHUCK DUNN,

Respondent.

---

OAH No. L-9462353

DECISION OF THE COMMISSION ON PROFESSIONAL COMPETENCE

PROCEDURAL BACKGROUND

On January 13, 1994, a Stipulation for Scheduled Hearing, a Notice of Accusation, the Accusation, a Statement of Charges, and a Notice of Defense were filed with the Office of Administrative Hearings. The parties, through counsel, stipulated in writing, inter alia, that the record be opened and a non-appearance jurisdictional hearing be deemed commenced on January 31, 1994, when certain documents were to be received into evidence for jurisdictional purposes, that the time and place of a hearing on the merits would be set later, and that each party retained the right to nominate a member to serve on a Commission on Professional Competence.

On October 4, notice was given that Paul Crost, attorney at law, and the law firm

Reich, Adell, Crost & Cvitan withdrew as counsel for respondent.

In late December 1994, the Office of Administrative Hearings was advised the law firm of Granowitz and White represented respondent.

On December 27, Alan S. Meth, Presiding Administrative Law Judge, Office of Administrative Hearings, San Diego, issued an order continuing the hearing date, extending discovery, and scheduling a prehearing conference. Judge Meth thereafter assigned the hearing to James Ahler, Administrative Law Judge.

On February 6, a prehearing conference was held before Judge Ahler. Hector E. Salitrero, of the law firm of Atkinson, Andelson, Loya, Ruud & Rorno, represented the Governing Board of the Jurupa Unified School District (hereafter the District). Gregory W. Brittain, of the law firm of Granowitz and White, represented respondent Chuck Dunn (hereafter respondent). Respondent was not present at the prehearing conference, but was present throughout the hearing. A prehearing conference order was issued requiring the District to produce a videotaped witness statement, requiring the District to produce certain records, requiring the parties to serve amended witness lists, and granting respondent further discovery. The hearing date previously set by Judge Meth was confirmed. The parties were advised continuances were not favored and required a showing of good cause.

On February 15, the District nominated Karen Hoag to serve as a member of the Commission on Professional Competence.

On February 24, respondent applied to the Office of Administrative Hearings for a continuance of the hearing on various grounds. The District opposed respondent's application. On February 27, Judge Ahler denied respondent's application.

On February 28, respondent nominated Doris Terrill to serve as a member of the Commission on Professional Competence.

On February 28, respondent sought judicial review of the denial of his application for a continuance in the Superior Court of California, County of Riverside.

On March 1, 1995, E. Michael Kaiser, Judge of the Superior Court, Riverside County, denied judicial relief from the order denying respondent a continuance.

On March 3, respondent again applied to the Office of Administrative Hearings for a continuance of the hearing on the grounds respondent was ill and respondent's counsel was then engaged in trial, making preparation of respondent's defense difficult. Judge Ahler denied respondent's application.

On March 7, the record was opened and the parties were advised the composition of the Commission complied with Education Code section 44944(b). No Commission member was related to respondent. No Commission member was an employee of the District. The Commission members nominated by the District and respondent each had at least five years' experience within the past ten years as a Special Education teacher.

On March 7, 8, 9, 13, 14, 15, 16, 17, 22, and 23, 1995, in Riverside, California, the matter was heard by a Commission on

Professional Competence composed of Administrative Law Judge Ahler, Karen Hoag, Vice Principal with the San Bernardino City Union School District, and Doris Terrill, Special Education Teacher with the Lassen Unified School District. Opening statements were given. Thereafter, oral and evidence documentary was received, the Commission viewed a videotaped deposition with each party's consent, stipulations regarding the Commission's jurisdiction and several evidentiary matters were reached, the Commission visited areas described by several witnesses, and closing arguments were given.[1] On March 23, the matter was submitted. Thereafter, the Commission deliberated and reached the following decision.

FINDINGS OF FACT

Finding 1:

At all times pertinent to this action, respondent was a permanent certificate employee with the District under a written employment agreement.

Finding 2:

On October 26, 1993, the District placed respondent on administrative leave with pay. On November 23, the District gave respondent notice of his proposed suspension without pay and notice of his dismissal based on a Statement of Charges. The Notice of Proposed Suspension and Dismissal advised respondent

---

[1] The hearing was reported by Dori Passons, C.S.R., with Kennedy Court Reporters, Inc. The Commission and the parties had the benefit of having the matter reported on Real-Time/Browser, permitting virtually instantaneous review of the transcript.

of his right to appear at a "Skelly" hearing scheduled for November 29. The Notice of Proposed Suspension and Dismissal was served by certified mail and was received by respondent on November 24.

Respondent requested the District continue the "Skelly" hearing to December 8 to afford him more time to prepare for that hearing. The District denied respondent's request to continue the hearing. Respondent advised he would not appear at the hearing on the date set by the District.

On December 6, the District's Board met to consider the Statement of Charges against respondent and, after deliberation, voted to suspend respondent immediately without pay.

On December 7, the District's Board gave respondent written notice of his immediate suspension without pay for immoral conduct and advised of its intent to dismiss respondent as a permanent certificate employee for the causes set forth in the Statement of Charges. Respondent was provided with pertinent provisions of the Education Code and was advised that unless his written request for a hearing was delivered or mailed to the District within thirty days of the notice, he would be dismissed without a hearing.

On December 17, respondent requested a hearing in writing.

On January 4, 1994, Benita Roberts, District Superintendent, signed and filed the Accusation in her official capacity, incorporating the Statement of Charges dated November 23, 1993. Respondent was duly served with the Accusation and the Notice of

Accusation. Thereafter, respondent timely filed a Notice of Defense.

Following those matters described in the Procedural Background, the matter was heard by the Commission.

Finding 3:

The District's standard of proof in this proceeding is a preponderance of the evidence.[2]

Finding 4:

Respondent was born on June 25, 1941. Respondent was raised in Southern California under somewhat financially impoverished circumstances. During his early education, two teachers made a significant impact on respondent. The first, a sixth grade teacher, inspired respondent's interest in education. The second, an eighth grade teacher, taught respondent the value of hard work. Respondent entered the United States Naval Reserve while attending high school. Respondent graduated from high school in 1959.

After graduating from high school, respondent turned down an appointment to the

---

[2] The preponderance of the evidence standard is applicable in administrative proceedings concerning the dismissal from employment of a holder of a professional license, as opposed to the higher standard of clear and convincing evidence to a reasonable certainty applicable in license revocation proceedings. Gardner v. Commission on Professional Competence (1985) 164 Cal.App.3d 1035.

United States Naval Academy. He then served six months' active duty on an aircraft carrier as a fireman. After his active duty, respondent attended community colleges in Southern California for approximately one year and then attended Brigham Young University for almost two years. Respondent returned to Southern California and continued his undergraduate education.

Respondent received a Bachelor of Arts degree in Sociology and his Teaching Credential from California State College, Los Angeles, in 1968.

During periods respondent attended college, he owned several small enterprises including a skateboard business and a surfboard rental shop. Respondent got along well with his patrons, and he founded a coeducational skateboard team which competed successfully throughout the state. Respondent held a variety of odd jobs, including working as a consultant with an import-export firm. Although his work as a consultant was financially rewarding, he found his work as a substitute teacher far more rewarding due to the relationships he developed with students. Respondent discovered he communicated very well with students and was able to effect positive changes in their lives.

Respondent attended Cal Poly, Pomona, where he was encouraged by a college professor to become a Special Education teacher. Respondent received a Learning Handicapped Credential in 1979 or 1980, a Masters of Business Administration with an emphasis in finance and statistics in 1980, and a Resource Specialist Certificate in 1981, all from Cal Poly, Pomona.

In fall 1980, respondent began his teaching career with the Jurupa Unified School District. Respondent initially worked at a junior high school where he was assigned to a special day class composed of lower functioning students. Respondent took pains to visit with each student's family. He began holding frequent "hobo cookouts" for students before school began, feeling his students and other students derived substantial social and educational benefits from these events. Respondent remained at a middle school until 1989, when he was reassigned to Jurupa Valley High School as a Special Education Teacher.

With regard to his teaching techniques, respondent found when he made friends with the "kids" and made learning "fun," his students were more likely to succeed. He treated special education students no differently than mainstream students in terms of expecting them to fulfill their educational goals, and he engaged in many projects, such as making "stone soup," to bring all students together in cooperative efforts yielding products in which all participants took pride.

Respondent became the advisor to several school clubs, including the computer club. He began a "Schools Without Drugs" program, a community based effort in which peer pressure was used to keep students from using drugs. He began the "STOP" program[3], a community based anti-graffiti program in which students painted over graffiti in the community.

---

[3] " STOP" is an acronym for Stop Tagging Our Property.

Respondent's success was evident. His classroom became a "hangout" for students to gather in creative activities before school, during brunch and lunch breaks, and after school. Respondent's colleagues referred many students to respondent for advice and counseling. Respondent developed a successful student aide program. Respondent created student competitions structured in such a fashion that each participant was virtually assured of being a winner.

Throughout the year, respondent took students on coed river rafting trips, gold mining trips, and rattlesnake hunting trips, always with parental permission and always with adult chaperons.

In addition to his school and community activities, respondent continued his skateboard business. Before 1989, respondent invited several low income students to assist him in assembling and selling skateboards at swap meets on the weekends, which augmented their incomes.

In 1989, respondent opened Rebel Sports, a retail store appealing to teenagers and young adults. Rebel Sports, which is still in business, sells skateboards, skateboard parts, "in, rad clothing and shoes," sports cards, and other youth-oriented merchandise. Respondent employed young persons, usually students he knew from school, to operate Rebel Sports, and he continues to do so.

Respondent devoted tremendous energy and creativity to his numerous projects, and he was justifiably proud of his successes. Respondent was praised by his students, their parents, many colleagues, and the community for his efforts. Respondent championed the

cause of "the underdog" and was not afraid to challenge those he felt were taking advantage of the weak or the oppressed. In connection with his student contacts, his operation of Rebel Sports, and his participation in several community based organizations, respondent developed intelligence networks he used to identify persons he suspected of crimes. He provided local law enforcement with information he gathered which was considered to be reliable.

When issues were not resolved in the manner respondent felt to be appropriate, respondent organized students, parents, and others and participated in political activities.[4] Respondent frequently spoke to the press when he felt inappropriate decisions were made. He frequently clashed with some teachers and administrators over decisions he felt were improper.

Finding 5:

The District, a public entity located in Riverside, serves the educational needs of its student residents from kindergarten through twelfth grades.

Jurupa Valley High School, a high school within the District, opened in September 1989. Alan Young (hereafter Young) was its

---

[4] Among other political activities, respondent mobilized students to reinstate the original name given the middle school (the organization was known as K.I.D.S., an acronym for Kindness In Developing Students) and established a political action committee composed of students, parents, and others which influenced the outcome of a school board election.

Principal. Vincent Tieri (hereafter Tieri) was Head of its Special Education Department. Respondent, a Special Education Teacher, was assigned Jurupa Valley High when it opened.

Finding 6:

(Statement of Charges, Item 29)

Respondent and Tieri disagreed about several matters shortly after Jurupa Valley High opened. Their disagreements escalated to the point respondent was suspended for five days, without pay, from March 8 through March 12, 1993.

Respondent's suspension had its genesis in a dispute in which respondent contended Tieri improperly disposed of a $150 balance from respondent's 1991-1992 supply fund. The dispute was fully and finally adjudicated before the California State Mediation/Conciliation Service.[5]

---

[5] The principles of res judicata and collateral estoppel exist with regard to the Arbitrator's Findings and Award in that dispute entitled "In the Matter of the Arbitration Between JURUPA UNIFIED SCHOOL DISTRICT And NATIONAL EDUCATION ASSOCIATION - JURUPA, Re: Suspension of Chuck Dunn," bearing SMCS Case No. 92 3 675.

The arbitrator had jurisdiction to resolve the dispute by virtue of a collectively negotiated agreement between the District and NEA - Jurupa. The arbitration was a judicial-like adversary proceeding heard by an impartial arbitrator mutually selected by the parties to the arbitration. Respondent was present throughout the arbitration and was fully and fairly represented. The parties to the arbitration were afforded a

Briefly, supply funds were allocated to respondent for use in the 1991-1992 school year. Tieri later advised respondent and other Special Education teachers that if supply funds were not spent by April 1992, any balance would be spent by Tieri as he determined to be appropriate in his discretion as the Head of the Special Education Department.

Respondent objected to Tieri's directive. Tieri referred respondent to Young, and reminded respondent the final date to request the expenditure of his funds was April 3. Respondent wrote to Young, challenging Tieri's decision and requesting Young implement a different plan.

On March 27, 1992, a District accounting technician wrote to all school principals stating, in part, "starting with the 1991-92 year, $51 or more of unexpended allocations will be carried over to be reflected in the 1992-93 budget year..."

---

full opportunity to present sworn testimony, cross-examine witnesses, and introduce documentary evidence. Each party presented closing oral argument before submission of the matter. The arbitrator's written decision was adjudicatory, and not legislative in nature. The arbitrator's decision contained detailed information concerning jurisdiction, the conduct of the hearing, the matters at issue, findings of fact, relevant contractual provisions related to "just cause" and the "grievance procedure," the parties' contentions, discussion and conclusions, and an award. That decision is attached hereto as Exhibit 1.

Respondent failed to spend all his supply funds by the April 3 deadline.

When the 1992-1993 school year began, Tieri advised respondent his supply allocation was $400. Respondent told Tieri he believed his supply allocation should include an additional $150, the amount of his unused supply allocation from the year before. Tieri refused to augment respondent's 1992-1993 supply fund as respondent requested.

Numerous memos were exchanged between respondent, Tieri, Young, and others. In addition, numerous private and public verbal confrontations occurred. The memos and confrontations were hostile and personal.

Young met with respondent and verbally and in writing directed respondent not to discuss the budgetary dispute with his students. Young warned respondent further violations might result in disciplinary action.

In response to his meeting with Young, respondent wrote a memo accusing Young and Tieri of harassing respondent and his students. Thereafter, respondent circulated a petition concerning the budgetary dispute.

Young met again with respondent and reviewed respondent's conduct from September 1992 through late February 1993. Following that meeting, Young commanded respondent, in a directive dated February 26, not to discuss the budgetary dispute and other specified matters with students, parents, or district employees, not to publish or circulate any documents relating to those matters, and to stop harassing Tieri and Young.

Respondent refused to follow Young's directive dated February 26, resulting in his

suspension for five days, without pay, which respondent served from March 8 through March 12, 1993.

Finding 7:

Examples of respondent's conduct include the following statements and memos.

On November 2, 1992, in a memo to Young responding to Young's written directive to respondent prohibiting respondent from discussing Department business with students or telling students and their parents Tieri confiscated funds belonging to students, respondent wrote:

> "The meeting of October 28, 1992, is a smoke-screen. Mr. Tieri took the money. I am the victim. The KIDS are the victims! READ THE MEMO!"

In November and December 1992, in the presence of students and staff, respondent repeatedly asked Tieri: "Where's my money, boy? I am going to get my money back, boy."

On February 23, 1993, during a meeting between respondent and Young, respondent threatened to picket Young's church to show the congregation Young was a "lousy Christian, supporting a guy who took money from the students." Respondent again called Tieri "a boy."

On February 24, in the presence of a student and a guidance coordinator, respondent confronted Tieri, stating "Where's my money? Am I going to get my money?" Respondent again accused Tieri of taking money belonging to respondent's students.

Respondent's statements in the budgetary dispute typify his confrontational approach

when he believed an erroneous decision was made.[6]

Finding 8:

(Statement of Charges, Item 33)

On March 3, 1993, and in a matter not considered in respondent's five-day suspension, respondent wrote a memo to Young which stated, in part:

> "No one can violate my right of free speech. Your threats are just that. Be a man and a real Christian. Give the students their money. Don't waste your time

---

[6] In his written decision published in May 1994, the impartial arbitrator reached several conclusions. Among other matters, the arbitrator concluded respondent was warned by the District that certain forms of conduct were prohibited and would result in serious disciplinary consequences if continued; notwithstanding such warnings, respondent discussed the supply allowance issue with students in the classroom, circulated a petition to students regarding the supply allowance issue, and persistently harassed Tieri publicly in the presence of students and staff.

The arbitrator rejected respondent's defense that his conduct was constitutionally protected free speech, concluding from the content, form, and context of respondent's statements that respondent's expression involved unprotected matters of personal interest and not matters of legitimate public concern.

Respondent's grievance was denied.

threatening me. You do not scare me. I am more of a Christian than you will ever be."

Respondent distributed this memo to parents, teachers, and others in the community.

Finding 9:

(Statement of Charges, Item 34)

On March 15, 1993, respondent returned to his classroom following his five-day suspension. That morning Tieri visited respondent's classroom accompanied by Sharon Huey, Tieri's instructional aide. Tieri testified he entered the classroom simply to verify the names and number of students assigned to respondent's caseload. Tieri testified he was personally responsible for verifying this information as Department Head, and did not request a response in writing because respondent failed to provide similar information in the past.

Tieri was certainly aware his presence in respondent's classroom the morning respondent returned from his suspension was humiliating to respondent, but it is without dispute that Tieri did not verbally provoke respondent at any point in their meeting.

As Tieri began leaving respondent's classroom, respondent made a comment Tiere did not hear. Tieri turned to respondent and said "I'm sorry" to indicate he had not heard respondent. Respondent replied, in the presence of his students and Ms. Huey, "You should be sorry. You owe me $1,500 now."[7]

---

[7] Tieri misunderstood respondent's reference to the sum of $1,500. Tieri thought respondent was directly referring to the

Finding 10:

(Statement of Charges, Item 35)

On April 28, 1993, respondent wrote a memo to Young containing, among other matters, the following statements:

"Alan, you do not understand the essence of Christianity. If you did, you would treat everyone equal. A real man would treat everyone equal"

"I question your manhood and Christian practices."

"I disagree with your statement that 'my manhood and religious beliefs are not relevant to our disagreement.' The total measure of how you have handled this disagreement is based on the type of man you are and how you practice your Christian principles. The crux of your thinking process is intimately linked to the type of man you are and how you practice your Christian principles. To give my students [sic] money to Vince Tieri, who testified against an innocent young girl from Jurupa Valley, is very unchristian and childish."

"I did not threaten to call your father, I said 'I would give him the memos and perhaps he could give you fatherly advice to help you.' Are you afraid your father would be fair and give the kids the $150 back?"

---

budget issue. Respondent was, according to his testimony, referring to the salary he lost by reason of his five day unpaid suspension arising out of his dispute with Tieri on the budget issue.

"What I do to help kids is none of your business. You should treat all kids equal."

"Too bad you are ashamed and afraid to let people know how unwise and unfair your actions are. I have written permission from the parents to use their students name to defend their children from the likes of you. I am not afraid and will never fear someone of your moral character. You are a coward. You hide behind a smoke screen of administrative regulations. You need to understand the essence of Christianity. You need to be a man, give the kid's [sic] their money."

In connection with this memo, respondent accused Young of lying.

Respondent testified he wrote the memos because he was frustrated with Young's failure to appreciate the correctness of respondent's position and Young's failure to remedy the wrongs respondent believed had occurred.

Finding 11:

(Statement of Charges, Item 36)

In September 1993, respondent discussed the contents of several confidential memos with Susan Loux, a reporter with the Press Enterprise. Respondent could not recall if he actually delivered confidential memos to her.[8] Respondent knew the content of the

---

[8] Young had a "confidential" stamp he used on memos he did not want to be circulated. The District had no rules or regulations regarding Young's use of the stamp, and Young's used it at his discretion. While the

confidential memos would be used by Ms. Loux in a newspaper article she was writing about respondent's grievance he filed in response to his five-day, unpaid suspension.

Respondent testified he believed his conduct was protected under the First Amendment to the United States Constitution. Although respondent had retained an attorney to advise him on other unrelated matters, and was aware that free speech issues involved many gray areas, he did not specifically consult an attorney before discussing the content of the confidential memos with Ms. Loux. His knowledge regarding free speech protection came from some casual conversations with his attorney and from a casual conversation with an attorney named Shiela, whose last name respondent could not recall, whom he met on a river rafting trip.

Finding 12:

(Statement of Charges, Item 37)

In late September 1993, respondent provided confidential memos to Steven S. Brockman, a Science teacher at Jurupa Valley High. Respondent delivered the memos at Brockman's request, believing Brockman would not disclose that fact to others. When Brockman was away from his classroom, Brockman's unauthorized possession of the confidential memos was inadvertently discovered.

---

Commission does not endorse the unregulated use of a "confidential" stamp as it may have a chilling effect on free speech, the documents on which Young placed the stamp in this matter were primarily matters of private concern and not matters involving substantial current public interest.

Contrary to respondent's belief, Brockman was not asked by Young or any other administrator to set respondent up. Instead, Brockman asked for the memos to assist in resolving his own budgetary problems, knowing at the time he was not to possess them.

Finding 13:

(Statement of Charges, Item 38)

Respondent met with Young on October 5. In the course of that meeting, respondent made several comments, including the following:

"What goes around - comes around."

"Take your best shot."

"Your private life is known better than you think."

"We'll see how long they [the District] keep you."

By the time these statements were made, both respondent and Young were unduly sensitive and each drew unreasonable inferences from the other's comments. The direct testimony and other evidence did not, and possibly could not, accurately relate the manner in which respondent made these comments. Respondent's comments, while predictable, were not threatening and did not constitute fighting words.

Finding 14:

Young disliked respondent, believing respondent used and involved students in political or professional conflicts between himself and others. Young believed respondent demonstrated a continuing pattern of insubordination. In a memo dated January 27, 1993, to Kent Campbell (hereafter Campbell), the District's Assistant

Superintendent of Personnel Services, Young stated:

> "I request your advice as to what disciplinary action is in order for Mr. Dunn. Is a suspension appropriate? Is dismissal in order as per Woodland vs. Commission on Professional Competence (1992)?"[9]

Young's memo to Campbell manifests Young's frustration with respondent and his desire that some disciplinary action be taken. The disciplinary action imposed in the next sixty days reflects the District's decision to suspend respondent for his misconduct, but not to dismiss him from employment.

Finding 15:

On October 26, 1993, Nancy W. (hereafter Nancy) formally made allegations concerning respondent resulting in respondent's immediate suspension, the filing of the Statement of Charges, and this dismissal proceeding.

Finding 16:

Nancy was born December 23, 1975, after her father and mother immigrated to the United States from Korea and settled in Riverside.

Respondent first met Nancy through Alan, Nancy's older brother, whom respondent regarded as one of the best skateboards in Riverside. When respondent opened Rebel Sports, Alan was his first paid employee.

---

[9] Young's reference was to Woodland Joint Unified School Dist. v. Commission on Professional Competence (1992) 2 Cal.App.4th 1429, which is discussed in Determination of Issues, infra., at p. **.

Although respondent and Nancy knew one another before she entered Jurupa Valley High in the fall 1990, neither was more than a casual acquaintance.

From the time Nancy entered Jurupa Valley High through her graduation in June 1994, respondent was never her teacher.

At all times relevant to the allegations set forth in the Statement of Charges, respondent's residence and Rebel Sports were in close proximity to Nancy's family's residence.

During the 1990-1991 school year, when Nancy was a freshman, respondent assisted her with homework, as he did for many other students. Respondent also counseled Nancy, as he did for many other students.

During the 1991-1992 school year, when Nancy was a sophomore, respondent continued to assist her with her homework and continued to counsel her, as he did for many other students.

Finding 17:

(Statement of Charges, Item 1)

During the 1992-1993 school year, when Nancy was a junior, respondent continued to assist Nancy with her homework, particularly her math assignments. From time to time, respondent worked an entire assignment, with the expectation Nancy would understand the concepts involved as he worked through the problems for her. Respondent used this technique before with other students and determined it was an effective manner to teach math concepts. Nancy copied respondent's work and turned it in as her own. Respondent did not, as Nancy testified,

habitually do her homework out of her presence and then leave the completed work at Rebel Sports or in her family's mailbox for her to pick up later.

Finding 18:

(Statement of Charges, Items 2 and 3)

On several occasions, when Nancy visited respondent in his classroom, he gave her free soft drinks. Although respondent customarily had cold soft drinks available for all students in his classroom and charged most other students for the soft drinks they consumed, other students were given free soft drinks as well.

Toward the end of the 1992-1993 school year, respondent made the following comments with regard to providing free soft drinks to Nancy and helping her with her homework:

"We have to figure out how you are going to pay me for all this, Dear Nancy."

Respondent made this type of comment to other students, both male and female, and while it might be offensive to some and certainly creates speculation as to its meaning, it was not proven the comment was intended by respondent to establish a sexual or romantic relationship with Nancy, although she later claimed this to be the case.

Finding 19:

(Statement of Charges, Item 3)

Toward the end of the 1992-1993 school year, respondent made the following comments to Nancy:

"You know what I need, I need a new girlfriend."

Respondent made this comment to others, both male and female, on many occasions. Respondent usually made this comment after his companion of a decade, Heather C., spent what respondent believed to be excessive amounts on clothing or other merchandise.

Nancy later claimed, but the preponderance of the evidence did not establish, that respondent's comments were an effort on his part to initiate a romantic or sexual relationship with her.

Finding 20:

(Statement of Charges, Item 8)

On several occasions during the summer 1993, respondent made the following statements:

"I notice you get uncomfortable or you change the subject or don't answer me when we talk about things like this [her personal life]. You need to learn to trust me because I care about you."

"You are not like any other student I have ever known. I can't figure you out."

"I care about you."

Respondent's statements were not proven to be an effort on his part to initiate a romantic or sexual relationship with Nancy. Respondent made the same or similar statements to other female students, and such assertions were genuine statements of his concern for them, as they were for Nancy.

Respondent's statement "I need a new girlfriend" was, as previously noted, commonly said by respondent to Nancy and others when respondent complained about what he believed to be Heather C.'s extravagant spending habits.

Finding 21:

Toward the end of the 1992-1993 school year and particularly during the summer of 1993, respondent developed an extraordinary preoccupation with Nancy. The reason for his interest is not well understood, but it had very little to do with any desire on respondent's part to have a sexual or romantic relationship with Nancy.[10] However, respondent became so obsessive of Nancy, her time, her interests, her activities, and her future, that his conduct passed well beyond that expected in an ordinary friendship, in a student-teacher relationship, or even in a parent-child relationship. Nancy was well aware of respondent's special interest in her, and she took advantage of it.

Beginning in the summer of 1993, respondent's behavior towards Nancy involved a summer shopping spree and, later, surveillance of Nancy and her boyfriend, and a program of misinformation and intimidation.

Finding 22:

(Statement of Charges, Item 5)

Shortly before the 1992-1993 school year ended, Nancy frequently called respondent at his home and at Rebel Sports. Her telephone calls continued into the summer. Respondent began spending a great deal of time alone with Nancy without her parents' knowledge.

---

[10] George Bernard Shaw may have partially expressed respondent's involvement with Nancy in his comedy Pygmalion, in which a professor successfully transforms a guttersnipe into a genteel Englishwoman.

Nancy drove her car to respondent's home at least ten times. She usually parked in respondent's garage or behind his home to keep her visits secret. She did so on her own volition and at respondent's request.

Respondent's home was on a remote cul de sac. Respondent's neighbors recognized the cars parked in the neighborhood. Respondent did not want to create any appearance of impropriety. Respondent did not want his employees, who disliked Nancy, to see Nancy's car if they came by his home. During this period, respondent's companion, Heather C., was frequently away on professional engagements. Respondent told Heather C. he and Nancy shopped together infrequently for school clothes. Respondent did not want Heather C. to know about all of the time he and Nancy spent together. Nancy did not want her brother to see her car at respondent's home and tell her parents about their visits.

Finding 23:

(Statement of Charges, Item 13)

The summer shopping spree, which respondent compared to Christmas shopping, was partially documented by his credit card statements and by the sales receipts Nancy retained.

On July 21, respondent and Nancy visited Contempo Casuals in the South Coast Plaza, Costa Mesa, where he spent approximately $125. The specific receipts reflect his use of his credit card to purchase, for Nancy, shorts, a sheer blouse, a tank top, and a sweater at 7:49 p.m. A $25 dress was purchased, for cash, that day at The Limited.

On August 10, respondent and Nancy visited factory outlets in Cabezon, where they

shopped at Esprit, Socks Galore, Levi's, and the Wallet Works. Approximately $310 was charged to respondent's account. The purchases occurred from approximately 6:00 p.m. to 7:00 p.m.

On August 23, respondent and Nancy visited the Old Barn, in San Juan Capistrano, where a $28 item was purchased. On that day, respondent purchased fifteen tapes for Nancy, at a cost of approximately $165. They dined at the North Woods Inn in Covina where the bill was nearly $50.

On August 25, they visited the San Diego Zoo, where the entrance fee of $26 was charged to respondent's credit card. When driving back, respondent permitted Nancy to visit a Palm Reader. The cost associated with the reading was not charged on a credit card.

On August 29, they shopped in Palm Springs, where respondent's credit card was used to purchase Nancy an $18 item at Saks Fifth Avenue, $38 of merchandise at Fit to be Tyed, and $591 of merchandise, including a neon clock, a mini water panel, a radio, and a black standing mirror at The Sharper Image, at 4:30 p.m.

On August 31, respondent purchased lamps for Nancy. $81 was charged to his account. A visit was also made to the Home Depot where hardware was purchased for her at approximately 7:52 p.m. The following day, they made some returns at 1:00 p.m.

Documentary evidence established respondent spent more than $1,419 in less than one and one-half months. About half was spent on clothing. In addition, respondent purchased other gifts with cash, gave Nancy a check for

$200 on the Rebel Sports checking account for unspecified purposes, and gave her a check on the Rebel Sports checking account for Nancy's tuition at Riverside Community College.

Respondent characterized his purchases for Nancy as part of a $3,500 "loan" respondent agreed to shortly after Nancy was involved in a traffic collision in June 1993. Some cash respondent provided was, in fact, a loan, but most of the items he purchased for Nancy were intended to be gifts. Respondent's documentation of the "loan" was created after Nancy disclosed her relationship with respondent to the District in late October 1993. Respondent failed to explain the reason the cost of repairs was converted into a personal loan.

Finding 24:

(Statement of Charges, Item 12)

In August 1993, respondent provided a door knob for Nancy to install on her bedroom door at her parents' house. It was purchased because Nancy's brother entered Nancy's room without her permission and took papers allegedly relating to an abortion. The key to the door knob matched the lock on respondent's front door. By then, Nancy was aware of the location of a spare key and the security alarm code to respondent's home.

Finding 25:

(Statement of Charges, Item 6)

During July and August 1993, respondent and Nancy dined alone several times. Sometimes the meal consisted of nothing more than chocolate chip cookies or a date shake. Once the meal was a visit to the salad bar at the Sizzler in San Bernardino. A meal was shared

at Socorro's Mexican Food in Cucamonga. Respondent also took Nancy to dinner at Clearman's North Woods Inn at 540 North Azusa Avenue, Covina, on August 23. Respondent dined there previously with Heather C. It was one of their favorite restaurants.

Finding 26:

(Statement of Charges, Item 11)

On a few occasions over the summer of 1993, respondent loaned Nancy his car keys when she borrowed his car. Nancy returned the keys when she returned the car. At the time Nancy used the car, it had no security alarm.

Finding 27:

(Statement of Charges, Item 11)

Respondent admitted he made inquiries to his insurance agent, Vicki McIntyre (hereafter McIntyre), about adding Nancy to his automobile insurance policy for his 1980 Honda Prelude. Respondent specifically denied directing his agent to add Nancy to his policy.

Respondent testified he received an insurance invoice in November adding Nancy as an insured on his policy, with coverage effective on September 21, 1993. Respondent claimed he was surprised and called McIntyre to find out why Nancy was added to his policy. Respondent testified McIntyre told him a male called and told her to add Nancy to respondent's policy. Respondent specifically denied directing that Nancy be added to his policy.

Respondent willfully misrepresented what actually occurred.

McIntyre and Allegiance Insurance Company maintained accurate business records

pertaining to respondent's automobile insurance policies, including Auto Change Policy Requests and phone logs. The documents established respondent telephoned Allegiance on September 21, 1993, and requested Nancy be added to his policy. Respondent provided Nancy's name, her driver license number, her date of birth, her marital status, the fact she completed driver's education, and the fact she was a student. Respondent also represented Nancy had no accidents in the past five years, a misrepresentation since respondent knew Nancy was involved in a motor vehicle accident within the past four months. Respondent provided additional information relating to Heather C., whom respondent stated was a licensed driver in his household and the owner of two vehicles, a Mercedes and a BMW, which were insured with other carriers. The information provided to Allegiance Insurance Company could only have come ROM respondent.

Thereafter, several telephone calls were exchanged between McIntyre and respondent and between McIntyre and respondent's answering machine. Respondent acknowledged the telephone number McIntyre called was his. Respondent was asked to provide evidence Nancy resided at his residence, as Nancy could only be insured under respondent's policy if she were a resident of his household. Respondent was also asked to provide evidence to establish Nancy qualified for a good student discount.

In response to McIntyre's telephone calls, Nancy's report card, dated 6-21-93, was submitted to Allegiance Insurance Company. The typewritten address on her report card was crossed out, and respondent's address,

printed in respondent's handwriting, was listed as Nancy's address.

On receipt of Nancy's modified report card, Nancy was added to respondent's policy, with coverage retroactive to September 21, 1993, the date respondent first requested Nancy be added to his policy.

Finding 28:

(Statement of Charges, Item 16)

In July 1993, respondent learned Nancy was dating Aaron G (hereafter Aaron). Respondent telephoned Nancy and made the following comments:

"I don't think you should be in a relationship."

"I don't think you should hop in bed with anyone."

"Nancy, don't be mad at me."

These comments evidence respondent's interest and involvement in Nancy's private life and activities away from school.

Finding 29:

(Statement of Charges, Items 17, 18, 19, 20, and 21)

Respondent's interest and involvement in Nancy's private life and her activities away from school was evident in respondent's contacts with Mandy U. (hereafter Mandy) over the summer of 1993.

Respondent knew Mandy when she attended junior high school and Jurupa Valley High. Although Mandy was not a special education student, respondent helped her, as he helped others, with her homework. Mandy also knew respondent because his business, Rebel

Sports, was located within a quarter mile of her home.

During the summer of 1993, Mandy and respondent had frequent telephone contact. Respondent told Mandy he was concerned about Nancy because Nancy was dating Aaron. Respondent asked Mandy to telephone Nancy, under an assumed name, to find out if Nancy was at home and what her plans were. Respondent also told Mandy that Nancy had an abortion.

Finding 30:

(Statement of Charges, Item 22)

In summer 1993, respondent asked Charles Scortino (hereafter Scortino), a neighbor who had known respondent for more than ten years, to drive him by "a friend's house" in Riverside. He told Scortino he wanted to observe his friend's house from Scortino's car so his own vehicle would not be seen in the neighborhood. Respondent told Scortino he was concerned about the possibility his female friend was associating with an ex-boyfriend who might be bad influence on her.

Scortino knew respondent was involved in anti-drug and anti-tagging activities. Scortino was, at the time, training to be a law enforcement officer and had become, by the time of the hearing, a Riverside City Police Officer.

Scortino drove respondent to Fourth and Comer in Riverside, the area Aaron's family lived. After traveling there, Scortino drove past the Riverside Public Library, which was located less than one-half mile from Aaron's residence. As Scortino drove by the library, respondent told Scortino he saw his friend's

car parked in front of the library. He asked Scortino to circle the block. Scortino did so. Respondent then told Scortino he saw his friend sitting on the library steps, identifying a short, dark haired Asian female.

Scortino drove respondent back to his home. Respondent told Scortino he would return to the library later in his own vehicle.

Respondent deceived Scortino by advising the house they were to observe was his "female friend's" when it was, in fact, Aaron's.

Respondent asked Scortino to obtain information maintained by law enforcement and other governmental agencies to assist in determining if his friend might be in any trouble. Scortino did not provide respondent with the information as it was available only to authorized persons through official channels and Scortino then had no access to it.

It was not established by a preponderance of the evidence that respondent followed Nancy and Aaron to the Riverside Public Library and appeared in front of them at approximately 10:00 p.m. on a summer's evening. It was established, however, that respondent spied on Aaron's house and on Nancy and that respondent attempted to obtain privileged information from Scortino which respondent could not readily obtain himself.

Finding 31:

(Statement of Charges, Item 23)

On October 1, and at respondent's direction, Mandy called Aaron and told him two men were watching Aaron's home. By this

time, Mandy had called Aaron numerous times at respondent's request to gather or pass information, but she had not disclosed her true identity to him.

Finding 32:

(Statement of Charges, Item 24)

On October 1, after Mandy told him his house was being watched by two men, Aaron became frightened for his safety and the safety of his five sisters who also occupied his home. Aaron called the police. Then he called respondent, believing respondent might be responsible based on his prior conversations with Nancy.

In the course of respondent's and Aaron's telephone conversation, respondent essentially made the following statements:

> "I care for her [Nancy], and I will do anything for her. If I have to, I will kill you to get you out of the way. Aaron, do you have a reason to play this little game with me? I grew up in El Monte and it's really bad there. You have much more to lose than I do. This is the last time I will ever talk to you because if I have to, I will go down there and do it right now."

Finding 33:

(Statement of Charges, Item 26)

Respondent also told Aaron in the October 1 telephone conversation that Nancy had an abortion. When Aaron asked if respondent was the father, respondent replied "It is none of your business."

Aaron called Nancy after speaking with respondent and related his conversation with respondent and the other events taking place earlier that evening.

Finding 34:

After speaking with Aaron, Nancy called Kerri L. (hereafter Kerri), a fellow student at Jurupa Valley High and an employee of Rebel Sports. In some fashion, Nancy gave Kerri the impression it was respondent's home that was being watched by two men with guns. Nancy asked Kerri to call respondent. Aaron's name came up in the course of their conversation. Kerri had no idea who Aaron was.

Respondent received a call from Kerri the evening of October 1. Kerri warned respondent two men with guns were outside his home. Kerri mentioned Nancy in their conversation. Respondent said "Don't worry."

After speaking with Kerri, respondent testified he went outside his home, looked around, and saw nothing. He testified he then went back to his home and rejoined Heather C. in bed. He did not call the police.

Finding 35:

(Statement of Charges, Item 25)

The following morning, Aaron received a telephone call from respondent, who made the following statements:

> "Aaron, you are in big trouble. You should not have told her [Nancy] all the things you told her. I asked you not to call her anymore."

In the course of their conversation the morning of October 2, respondent implied he would harm Aaron's family if Aaron continued to associate with Nancy.

Finding 36:

It was not established that respondent caused either Aaron or respondent to be followed over the next several weeks, although each believed they were being followed.

After the October 1 telephone calls, Nancy told respondent she did not want him interfering in her life or Aaron's life. Nancy told respondent she wanted him to leave her alone.

Finding 37:

(Statement of Charges, Item 27)

On October 22, the day of Jurupa Valley High's Homecoming Dance, respondent telephoned Mandy and told her Nancy's plans for the evening. Respondent told Mandy there would be surveillance at Raincross Square, where Nancy planned to go with Aaron in connection with the Homecoming Dance.

Mandy became concerned and called Nancy. Nancy was very upset that respondent was continuing to bother her.

Finding 38:

On October 26, Nancy met with Karen Pina (hereafter Pina), her Guidance Counselor, to complain of respondent's conduct. After a brief conversation with Nancy, Pina determined it was a staff/student problem, and turned the matter over to Young. Nancy was interviewed. Nancy's parents were contacted. The Riverside County Sheriff's Department was contacted. Pina filed a report with Child Protective Services.

On October 26, following his interview with Nancy, Young placed respondent on administrative leave with pay.

Finding 39:

When Nancy formally made her allegations to the District on October 26, she referred to Mandy's involvement. Pina contacted Mandy and was told respondent requested Mandy to call Nancy and Aaron using assumed names to obtain information about their relationship and to relay any information to respondent.

Finding 40:

(Statement of Charges, Item 28)

After respondent was placed on administrative leave, he learned of Mandy's potential involvement in the District's investigation.

On November 4, respondent called Mandy and told her that Pina might contact her. Respondent told Mandy to tell Pina she had no information about the matter. He instructed Mandy to tell Pina Nancy "was a liar and had been using drugs."

Finding 41:

Following an interview with Pina and employees of the District's attorneys, Mandy signed a declaration concerning her involvement with respondent over the summer and fall of 1993.

Thereafter, Mandy had second thoughts about her declaration. Mandy took a copy of her declaration to respondent for his review. Respondent told Mandy changes needed to be made to her declaration. Respondent referred Mandy to Virginia Blumenthal, a criminal defense attorney he had retained. After meeting with Blumenthal, extensive changes to Mandy's declaration were made, in Mandy's handwriting, which essentially exculpated respondent.

Finding 42:

Mandy had a difficult home life and a difficult personal life. She was not of superior intelligence. She was not popular. She used drugs. She is now a single mother of an infant. She has no visible means of support.

Mandy had divided loyalties between her peers, whom she frequently contacted by telephone and deceived over the summer and fall of 1993, and respondent, who was one of the few persons who provided her with any type of support in the preceding years. Mandy felt trapped.

After Mandy became pregnant, respondent provided her with assistance from April through August 1994. Indeed, when the administrative hearing was ongoing, Mandy called respondent for assistance because her car was impounded and she and her infant needed a ride. Respondent gave her the ride.

Finding 43:

After recanting most of the information contained in her declaration, Mandy gave a videotaped statement at the District's request. Respondent and his counsel had no knowledge the statement was taken and were not present.

Several months after giving the videotaped statement, Mandy told respondent what she had done. Respondent was very upset, and told Mandy it was "a stupid thing to do." He told Mandy "We've got to figure out a way to fix it."

Mandy's deposition was taken the night before she testified. Respondent was present. In her deposition, Mandy specifically denied respondent offered her

any consideration for changing her testimony. The following day, Mandy testified respondent offered to give her a portion of any "wrongful termination" settlement or judgment he received from the District. Mandy lacked the experience, the education, and the sophistication to have any independent knowledge of respondent's potential recovery from a "wrongful termination" cause of action.

Respondent attempted to improperly influence Mandy's testimony. Although Mandy did not believe the prospects of respondent's recovery against the District to be realistic, she was concerned about respondent's influence over her associates if she gave testimony adverse to him.

Finding 44:

(Statement of Charges, Item 30)

In March 1993, respondent was contacted by the mother of Ambrosia G., a student who was suspended for refusing to leave the school grounds at the site administrator's request. Ambrosia had a bruise on her arm which she alleged to be the result of the site administrator's use of excessive force in removing her from the campus. Respondent recommended Ambrosia's mother contact Child Protective Services and T.A.S.K.

Respondent was not responsible for determining whether the site administrator had, in fact, used excessive force. His recommendation, based on the information available to him, was reasonable.

Finding 45:

(Statement of Charges, Items 4, 7, 9, 10, 14, 19, 20, 31, and 32)

It was not established that toward the end of the 1992-1993 school year, and during the summer of 1993, respondent made sexual comments to Nancy.

It was not established that in or about July 1993, respondent offered to obtain a false identification for Nancy to enable her to pose as a twenty-one year old person.

It was not established that in or about June 1993, following his return from a gold mining trip, respondent made comments with sexual overtones to Nancy or suggested he wanted to work on having a relationship with her after she graduated.

It was not established that in June or July 1993, respondent took Nancy to one of his rental properties and introduced her to a repairman as his "girlfriend."

It was not established that in August 1993, respondent told Mandy he was in love with Nancy and had given her a set of his house keys and car keys.

It was not established that in August 1993, respondent told Mandy he was stalking Aaron, that he had driven his car to Aaron's neighborhood to watch his home, or that he followed Aaron after Aaron left home.

It was not established that in March 1993, respondent informed the mother of Joe A., who was on suspension, that Jurupa Valley High School was "out to get Joe" or that Joe's counselor was substandard and only counseled "females eighteen or older."

It was not established that in March 1993, respondent telephoned several students to discuss his suspension or budget issues.

It was not established whether Nancy had an abortion.

Finding 46:

Nancy attempted to take advantage of nearly every person with whom she had a relationship. She deceived others when it was to her benefit. She shamelessly admitted she associated with respondent simply because he showered her with gifts. The disclosure of her relationship with respondent in late October 1993 exemplifies Nancy's ability to manipulate the system and was a successful effort to rid herself of respondent's by then unwanted attention. Nancy's allegations regarding respondent's expressions of his desire to have a sexual or romantic relationship with her were not believed. Her accusations concerning respondent's obsession with her and his interference with her life were true and well corroborated.

Finding 47:

A parade of witnesses - respondent's former students, their parents, his colleagues, and law enforcement officers - testified regarding respondent's unquestioned skills as a teacher, his powerful sway over youth, and his positive influence in the community.

The female students' testimony established respondent's treatment of Nancy over the summer and fall of 1993 was far different than his treatment of them.

The parents' testimony regarding respondent's positive influence on their children and their respect for respondent as a teacher, friend, and trusted counselor established respondent's relationship with Nancy's parents was far different.

Respondent failed to advise Nancy's parents of his activities with Nancy. Nancy's parents were told next to nothing.

While the testimony of respondent's colleagues established their belief in respondent's fitness as a teacher, it also demonstrated respondent had not been forthright in disclosing to them all of his activities.

The testimony of former students and several law enforcement officers established respondent's practice of surreptitiously gathering information. It is of much concern that respondent, who lied under oath, is considered by law enforcement agencies in Riverside County to provide reliable information.

Perhaps most sadly, the testimony of Heather C., respondent's companion and confidant of more than a decade, established respondent's dishonesty in describing his activities with Nancy.

Finding 48:

Respondent did not respect the proceeding in which he gave sworn testimony. He refused to directly answer questions. He demonstrated tremendous recollection when describing favorable matters, but claimed to lack recollection of harmful events. He stood behind the constitutional protection of free speech when it suited him, but failed to recognize other's constitutional rights of privacy. He attempted to improperly influence the testimony of some witnesses. He deliberately misrepresented the truth.

In all, respondent, through his conduct, attitude, and testimony, firmly established one issue the District alleged: dishonesty.

## DETERMINATION OF ISSUES

### Determination 1:

Cause exists for respondent's dismissal under Education Code section 44932(a)(1), based on Findings of Fact 23, 27, 29, 30, 31, 32, 35, 37, and 40, which establish respondent's immoral conduct.

"Immoral conduct" is not confined to sexual matters.

It also includes willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community and an inconsiderate attitude toward good order and the public welfare. The term is sometimes used as synonymous with "dishonesty" or a high degree of unfairness. Board of Education v. Weiland (1960) 179 Cal.App.2d 808, 811.

Teachers may make small gifts to students to show affection or to reward good efforts. Teachers may, under appropriate circumstances, loan their personal vehicles to students. Teachers can, and should, be honest and frank with their students and encourage them to avoid bad influences. Teachers may offer support and guidance to students in a variety of ways and remain confident their efforts will not result in their dismissal.

The Commission was not asked to draw a bright line to establish for all time what is acceptable behavior and what is not. Rather, the Commission was asked to determine if the District established respondent's alleged

misconduct was immoral. The Commission concludes it was.

Respondent concealed his $1,500 summer shopping spree with Nancy by not picking her up at her home, by not discussing their activities with her parents, and by taking pains to ensure others would not know the extent of their activities. Respondent's description of his gifts to Nancy as a "loan" was disingenuous and established his knowledge his conduct was improper. Parents have the right to know what their children do with teachers. Teachers have no right to conceal their activities with students, even when a language barrier or a perceived lack of parental interest exists. It is no defense Nancy was a temptress and respondent succumbed. Nancy was a minor and a student. Respondent was an adult and a teacher. Respondent knew better.

The circumstances by which respondent added Nancy to his insurance policy involved great dishonesty. Respondent misrepresented Nancy's driving record and the fact she resided in his household. Respondent's willful misrepresentation of the facts surrounding his adding Nancy to his insurance policy established his knowledge that his conduct was dishonest.

Respondent directed Mandy to telephone Nancy and Aaron under assumed names to gather information about their relationship. Respondent directed Mandy to relay misinformation to Nancy and Aaron. Respondent's conduct involved a high degree of unfairness and dishonesty.

Respondent instructed Mandy to tell Pina that Nancy was a liar and was on drugs to

keep the District from discovering the truth. Respondent's conduct involved a high degree of unfairness and dishonesty.

Respondent's threats of great physical violence to Aaron and his family, in his effort to keep Aaron from associating with Nancy, evidenced respondent's inconsiderate attitude toward good order and the public welfare. A teacher should not make death threats. Inevitably, such threats will be taken seriously and violence will occur.

Determination 2:

Cause exists for respondent's dismissal under Education Code section 44932(a)(5), based on Findings of Fact 10, 11, 12, 22, 23, 25, 26, 29, 30, 31, 32, 35, 37, and 40, which, in their totality, establish respondent's evident unfitness for service.

Respondent's offensive personal memos to Young, his disclosure of the contents of confidential memos to the press, his distribution of confidential memos to his colleagues, his unwarranted conduct toward Nancy, his use of Mandy, his threats to Aaron and Aaron's family, and his efforts to thwart the District in its investigation, establish respondent's evident unfitness for service. In reaching this determination, the Commission relied on the majority's decision in Woodland Joint Unified School Dist. v. Commission of Professional Competence (1992) 2 Cal.App.4th 1429.

"Evident unfitness for service," a ground for dismissal under Education Code section 44932(a)(5), properly means "clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies." Unlike "unprofessional

conduct," "evident unfitness for service" connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district. Ibid., at p. 1444.

Even though "evident unfitness for service" differs from "unprofessional conduct," the criteria for assessing a teacher's possible unfitness, articulated in Morrision v. State Board of Education must be analyzed to determine, as a threshold matter. Ibid., at p. 1445.

Morrision v. State Board of Education (1969) 1 Cal.3d 214, 119-230, set forth several relevant factors to assist the fact finder in determining whether a teacher is fit for service. The Commission applied the Morrision factors as follows:

1. Respondent's conduct directly and adversely affected Nancy, a student, Mandy, a former student, Tieri, a teacher, and Brockman, a teacher. Respondent's insubordination directly created conflicts within Jurupa Valley High and within the District.

2. Respondent intended to involve Nancy, Mandy, Tieri, and Brockman. Respondent knew his conduct was inappropriate, as was evidenced by his efforts to conceal it.

3. Respondent's misconduct existed well before his suspension without pay in December 1993 through the administrative hearing.

4. Respondent's assignment at Jurupa Valley High was appropriate for the credential he held.

5. The circumstances surrounding respondent's unprofessional conduct were aggravated.

6. Respondent's motives were not praiseworthy. He acted for his own benefit. His inappropriate conduct continued after Nancy asked him to stop. His conduct was not carried out for the benefit of any colleague or for the benefit of the District.

7. Respondent would likely engage in similar conduct in the future. Respondent testified he first formed the belief his memos might be inappropriate when the dismissal proceeding was brought, notwithstanding his prior five-day unpaid suspension. Respondent's dishonest testimony established he would likely engage in similar misconduct in the future. He expressed no remorse.

8. Respondent will be missed by many students, their parents, numerous colleagues, and some members of the community.

Disciplinary action against respondent may have a chilling effect on the constitutional rights of other teachers who were deceived by respondent and believe his dismissal resulted from his willingness to air grievances. Respondent's dismissal is not the result of his exercise of his constitutional right of free speech; rather, it is the result of his lack of judgment, his dishonesty, his propensity to engage in immoral conduct, his insubordination, and his unwillingness to accept reasonable administrative direction.

Respondent was suspended without pay for five days for his persistent acts of insubordination related to the dissemination of confidential information concerning the

budget issue and for his persistent harassment of Tieri. Following his return from his suspension, respondent continued to engage in similar offensive conduct. By that time, respondent knew or reasonably should have known his conduct was unprofessional.

Respondent engaged in a pervasive pattern of immoral and dishonest acts evidencing a disregard for, and violation of, the rights of others. Respondent's manipulative and deceitful conduct extended through the final day of the administrative hearing. Respondent never expressed remorse.

Respondent is unable to remedy his unprofessional conduct by reason of a defect in his temperament.

Determination 3:

Cause exists for respondent's dismissal under Education Code section 44932(a)(3), based on Findings of Fact 22, 25, and 40, which establish respondent's dishonesty.

Respondent concealed from Nancy's parents her regular visits with him, their dining alone together, and their summer shopping spree. Respondent attempted to thwart the District's investigation by instructing Mandy to tell the District that Nancy was a liar and a drug user.

Respondent's dishonesty and disposition to deceive is also demonstrated in Findings of Fact 12, 23, 27, 29, 30, 41, 43, and 48.

Determination 4:

Respondent's principle evidentiary defense was that Nancy, Aaron, and Mandy were not credible witnesses and the evidence presented against him was simply the product of the District's efforts to rid itself of his

services. Respondent contended "the evidence has established a pattern of unfair or discriminatory treatment, probably even harassment, dating back to his efforts with the school board to keep his student aides, and then with the name change campaign and 1989 school board election." Respondent contended his credibility, and the credibility of those witnesses called in his support, was unquestioned and should be accepted, particularly regarding his competence as a teacher.

Nancy, Aaron, and Mandy were far more credible than respondent. Much of respondent's testimony was inherently improbable. Considerable evidence corroborated Nancy, Aaron, and Mandy's testimony. Respondent was not credible, and considerable evidence contradicted his testimony. Those who testified on respondent's behalf were well intentioned, but had no personal knowledge of respondent's activities with Nancy, Aaron, and Mandy over the summer of 1993, which had nothing to do with respondent's previous political activities or skills as a special education teacher.

The totality of the evidence associated with respondent's conduct with Nancy over the summer and fall of 1993, in itself and apart from respondent's prior conduct, amply justified the Board's dismissal of respondent from employment.

Determination 5:

Respondent's principle legal defense was grounded on the right of free speech under the First Amendment to the United States Constitution. This defense did not apply to

those charges associated with respondent's conduct with Nancy over the summer and fall of 1993.

With respect to free speech issues, Chester J. Antieau in 1 Modern Constitutional Law (1969), section 1:1, wrote:

> "The individual has, of course, a legitimate interest in being able to express his thoughts and ideas.
>
> Additionally, there is a very important societal interest in encouraging communication and association. What is usually spoken of as freedom of speech might better be described as freedom to hear; and freedom of the press more properly designated as the freedom to read. Society has an interest in having unimpeded access to all new ideas, so that people may better govern themselves, may function economically more successfully, may attain happiness more readily and more fully. Our society is posited upon the premise that exposure of ideas to the market-place of thought will provide a testing of the merit of proposals, so that the irrational and ill-advised can be abandoned and the meritorious adopted."

It has been long recognized that although an individual has rights of free speech, such rights may be limited by one's employment. Thus, in McAuliffe v. New Bedford (1882) 155 Mass. 216, 220, Oliver Wendell Holmes wrote :

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employment's for hire in which the servant does not agree to suspend his constitutional rights of free

speech as well as of idleness by the implied terms of his contract."

A teacher has rights of free speech which are constrained, to some extent, by his or her public employment as a teacher.

In Pickering v. Board of Education (1964) 391 U.S. 563, the United States Supreme Court rejected the argument that public employment can be subject to unreasonable conditions limiting free speech. The Court held that absent proof of false statements knowingly or recklessly made, "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." Ibid., at p. 574.

The Court also recognized:

> [I]t cannot be gainsaid that the State has interest as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interest of the [employee] as a citizen, in commenting on matters of public concern and the interest of the State, as a employer, in promoting the efficiency of the public services it performs through its employees." Ibid., at p. 568.

Givhan v. Western Line Consolidated School District (1979) 439 U.S. 410 held the First Amendment protects free speech when a public employee communicates privately with his employer, rather than expressing his views publicly.

Connick v. Myers (1983) 461 U.S. 138 further examined the subject of the free

speech rights of public employees. The United States Supreme Court concluded that, except in the most unusual circumstances, when a public employee speaks on matters of personal interest, the judicial system is not the appropriate forum to review the wisdom of a personnel decision taken by a public agency allegedly reacting to the employee's behavior. While the line of demarcation between protected matters of legitimate public concern, on the one hand, and unprotected matters of personal interest, on the other, may not always be clearly discernible, the determination is to be made by examining the "content, form and context" of the employee's statements.

> "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark - and certainly every criticism directed at a public official - would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs. Ibid., at p. 149.

The impartial arbitrator determined from the content, form, and context of respondent's statements and memos published before April 1993 that respondent's "speech was not designed to enable the public to make informed decisions about the operation of their public school system," but was, instead, "a matter of personal concern rather than a matter of public interest..."

Respondent's memo to Young dated March 3, 1993, which he distributed to parents, teachers, and others in the community, was an expression of his dissatisfaction with Tieri's and Young's decisions, based on its content, form, and context. As the budget policy had changed, there was no need for any further public debate over the "use it or lose it" policy. The primary purpose of the March 3 memo was to provoke Young.

Respondent's memo dated to Young dated April 28, 1993, was also an expression of his personal dissatisfaction, based on its content, form, and context. Again, the primary purpose was to provoke, and not to assist in making informed decisions.

Respondent's delivery of the contents of memos Young marked confidential to a reporter with the Press Enterprise was inappropriate and was not protected by either the First Amendment or the agreement between the teacher's union and the District. Debate over the "use it or lose it" policy had long passed. Respondent's disclosure of the contents of confidential memos to the press was simply an effort to conduct his private dispute in public.

Determination 6:

Traditionally, a teacher was viewed as an exemplar whose conduct was influential in shaping the lives of students. It has always been the recognized duty of a teacher to conduct himself or herself in such a way as to command the respect and good will of the community, though one result of the choice of a teacher's vocation may be the deprivation of some freedoms enjoyed by persons in other vocations.

Today teachers have the nearly insurmountable task of dealing with increases in class sizes, cultural issues, behavioral problems, threats of violence, unrealistic expectations from parents, and budgetary constraints. Teachers, more than any other profession, deserve greater compensation. Even in the midst of financial crisis, next to our investment in our children, teachers represent the best investment money can buy. The vigor, commitment, and dedication most public school teachers display each day in their classrooms is astounding.

For these reasons, a teacher of respondent's abilities is a tremendous community resource. Notwithstanding respondent's abilities and all he accomplished while employed with the District, based on the totality of the evidence, respondent should be dismissed under Education Code sections 44932(a)(1), 44932(a)(3), 44932(a)(5), and 44944(c).

Determination 6:

Pursuant to Education Code section 44944(e), the costs and expenses of the hearing, as set forth in Education Code section 44944(e), shall be shared equally between the District and respondent.

Dated: 4/21/95 James Ahler
Administrative Law Judge
Office of Administrative Hearings

Dated: 4/21/95 Karen Hoag
Vice Principal

San Bernardino Unified
City School Dist.

Dated: 4/21/95 Doris Terrill

Special Education Teacher
Lassen Unified School
District

EXHIBIT 1

In the Matter of Arbitration

Between

JURUPA UNIFIED SCHOOL DISTRICT

And

NATIONAL EDUCATION ASSOCIATION JURUPA

Re: Suspension of Chuck Dunn

ARBITRATOR'S FINDINGS AND AWARD

SMCS Case No. 92 3 675

---

This arbitration is conducted pursuant to the provisions of a collectively negotiated agreement (effective July 1, 1992 to June 30, 1995) between the National Education Association Jurupa (designated as the "Association") and the Jurupa Unified School District (referred to simply as the "District"). The parties agree the matters at issue are properly submitted in arbitration. From a panel provided by the California State Mediation/Conciliation Service, Kenneth A. Perea was mutually selected by the parties to serve as Impartial Arbitrator.

THE HEARING

This dispute was heard in Riverside, California on September 14, 1993.

Throughout the course of the hearing, both parties were afforded full opportunity to present sworn testimony, cross-examine

witnesses and introduce documentary evidence. The matter was thereafter submitted upon closing oral argument. The grievant, Chuck Dunn, who attended the entire proceedings and testified upon his own behalf, was fully and fairly represented by the Association.

APPEARANCES

The Association and the grievant, Chuck Dunn, were represented at the hearing by William B. Bianchi, Executive Director, Citrus Belt UniServ, Inc. The appearance on behalf of the District was made by Ronald C. Ruud, Atkinson, Andelson, Loya, Ruud G Romo, attorneys at law.

THE MATTERS AT ISSUE

At the outset of the proceedings, the parties stipulated to the following statement of the issues to be adjudicated herein:

1. Did the District violate Article V, Unit Member Rights, Section 4 - Just Cause, when it suspended grievant for five (5) days, without pay, from March 8, 1993 through March 12, 1993?

2. If so, what, if any, is the appropriate remedy?

FINDINGS OF FACT

The District, a public school employer pursuant to the Educational Employment Relations Act, is located in Riverside, California.[1] The District, which services the educational needs of its student residents from kindergarten through 12th grade, is

---

[1] The Educational Employment Relations Act, (hereafter referred to as the "EERA," is codified at Government Code Sections 3540 et. seq.

comprised of approximately 700 certificated employees.

The Association is the exclusive representative under the EERA of all full- and part-time certificated employees of the District excluding management, confidential and supervisory employees.

There currently exists a collectively negotiated agreement between the District and the Association governing the wages, hours of employment and other terms and conditions of employment of certificated employees for the term July 1, 1992 through June 30, 1995.

Chuck Dunn (hereafter "Dunn") is a bargaining unit member and Special Education Teacher at the District's Jurupa Valley High School. Dunn has served as a Teacher in the District for 13 years.

Upon commencement of the 1991-1992 school term, Dunn, as well as all other Special Education teachers, were advised by Special Education Department Chair Vince Tieri the supply allocation for each department member would be $400. Thereafter, during a January 14, 1992 Special Education Department (hereafter " Department") meeting, Department Chair Tieri advised all Special Education teachers that unless their allocated budget funds were depleted by April 1992 such funds would be spent at the discretion of the Department Chair.

On January 31, 1992, Dunn wrote to Tieri objecting to the letter's decision to spend Department supply funds which were not depleted by April 1992.

On February 7, 1992, Department Chair Tieri responded to Dunn suggesting Dunn direct

any questions regarding Department expenditure of supply funds to Jurupa Valley High School Principal Alan Young. Tieri furthermore reminded Dunn the final date to request expenditure of Department funds was Friday, April 3, 1992. On February 7, 1992, Dunn wrote to Principal Young challenging Department Chair Tieri's decision regarding expenditure of Department supply funds.

Dunn requested Young implement a "fairer, democratic, equitable, and prudent plan for spending my departmental moneys."

On March 27, 1992, Accounting Technician Suzy Fisher issued a memorandum to all school principals regarding " Special Education Budgets." According to Accounting Technician Fisher's memorandum,

> " To discourage unnecessary purchases and encourage savings, starting with the 1991-92 year, $51 or more of unexpended allocations will be carried over to be reflected in the 1992-93 budget year. Any dollar amounts of less than $51 would not be carried forward."

Upon commencement of the 1992-93 school year, Department Chair Tieri advised Dunn his supply allocation for the year would be $400. Dugan, in turn, challenged Tieri stating he believed the amount of his supply allocation for the 1992-93 school year should include $150 carried over from his unused supply allocation from the 1991-92 school year.

Dunn thereafter repeatedly challenged Department Chair Tieri verbally regarding Tieri's expenditure of $150 which remained in Dunn's supply allocation account for the

1991-92 school year after April 3, 1993. On October 28, 1992, Principal Young met with Dunn regarding conversations between Dunn and Department Chair Tieri on October 14 and 15, 1992.

During the course of the meeting, Principal Young directed Dunn not to discuss the issue of Department supply funds with students. Principal Young admonished Dunn that further violations of the District's Code of Ethics of the Teaching Profession may result in disciplinary action.

On November 2, 1992, Dunn responded to Principal Young in writing asserting:

I have determined that you and Mr. Tieri harass my students and myself. Perhaps you are attempting to document me in order to harass me. Stating an opinion either personal or in public is not grounds to fire me. Check the First Amendment, Freedom of Speech.

The meeting of October 28,1992 is a smokescreen. Mr. Tieri took the money. I am the victim. The KIDS are the victims.' Mr. Tieri is a thief. READ THE MEMO!

On January 2, 1993, Principal Young met with Dunn regarding Dunn's circulation of a petition regarding the before-mentioned $150 supply allocation. That same day Dunn was admonished by Principal Young for a letter from Rebel Sports, a local retail establishment owned by Dunn, concerning its refusal to continue supporting activities at Jurupa Valley High School.

On February 23, 1993, Dunn met with Principal Young regarding Dunn's conduct from September 1992 through February 23, 1993.

Dunn was thereafter issued a memorandum by Principal Young dated February 26, 1993 summarizing the contents of the February 23, 1993 meeting. Principal Young therein directed Dunn as follows:

1. You are directed not to discuss the budget issue, the Dave Hite issue or my beliefs with students, parents, or employees.

2. You are not to engage in activities such as petitions and letter writing regarding the budget issues, the Dave Hite issue with students, parents, or employees.

3. You are to cease and desist from your harassment of Mr. Tieri with statements such as, "where's my money, boy?" or in any other form.

4. You are directed to cease from your harassment of me in any form, including but not limited to threatening or disrespectful statements and picketing or influencing others to picket my church.

If you continue with any of the above behaviors, you may face serious disciplinary action, including suspension without pay or dismissal.

On February 24, 1993, Department Chair Tieri reported an incident between Dunn and himself, witnessed by Guidance Coordinator Karen Murphy, to Principal Young.

On March 5, 1993, Principal Young met with Dunn and presented to him a "Notice of Proposed Suspension." Dunn was thereupon advised he would be suspended without pay for five working days from March 8, 1993 through March 12, 1993.

Dunn subsequently served a five-day suspension without pay from March 8, 1993

through March 12, 1993.On March 15, 1993, Dunn initiated a formal grievance alleging a violation of Article V, Unit Member Rights, Section 4 just Cause. The grievance was thereafter processed by the Association upon Dunn's behalf in accordance with the parties' grievance procedure and was ultimately referred to arbitration for adjudication.[2]

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE V

UNIT MEMBER RIGHTS

Section 4 - Just Cause. Unit members shall be classified, assigned, evaluated, promoted, terminated, suspended, and disciplined by the District for just cause only.

ARTICLE XXI GRIEVANCE PROCEDURE

Section 7 - Level IV.

B. The arbitrator shall, as soon as possible, hear evidence and render a decision on the issues submitted to him/her. The arbitrator shall consider only those issues, which have been properly carried through all prior steps of the grievance procedure. If the parties cannot agree upon a submission agreement, the arbitrator shall determine the issues by referring to the written grievance and the answers at each step.

C. The arbitrator's decision must be

---

[2] At the conclusion of the proceedings on September 14, 1993, the parties entered into a stipulation regarding the testimony of Karen Murphy, Esther Hopper, Ernie Garcia and Joe Ariola. That stipulation is memorialized as Appendix "A" to be Arbitrator's Findings and Award and is incorporated herein by reference.

limited to the specific issue(s) submitted to him/her, and based on the arbitrator's interpretation of meaning and application of the language in the Agreement. The arbitrator's decision will be in writing and will set forth findings of fact, reasoning and conclusions. The arbitrator in rendering his/her opinion will have no power or authority to add to, subtract from, or to alter, amend, change or ignore any of the terms and conditions of this Agreement or any applicable rules, regulations or policies. At the conclusion of the proceedings on September 14, 1993, the parties entered into a stipulation regarding the testimony of Karen Murphy, Esther Hopper, Ernie Garcia and Joe Ariola. That stipulation is memorialized as Appendix "A" to the Arbitrator's Findings and Award and is incorporated herein by reference. The arbitrator's decision will be accepted as final and binding on the District and the grievant unless it is violative of applicable law or it is the product of clear bias, self-interest, or fraud on the part of the arbitrator.

THE CONENTIONS Of THE PARTIES

A. Arguments on Behalf of the District

The District contends Dunn was suspended for just cause in accordance with the Agreement. According to the District, the suspension at issue represents the culmination of a pattern of behavior by Dunn which resulted in disciplinary action.

Dunn's misconduct was outrageous, states the District, and included the harassment of Department Chair Tieri throughout the 1992-93 school year. The District further notes

counseling sessions with Principal Young and admonitions in late October failed to correct Dunn's misconduct. Dunn's misconduct continued, asserts the District, from November 1992 through February 1993. During a March 1, 1993 meeting with Principal Young, Dunn admittedly told Young, eyeball to eyeball--" Yes, I've been asking Vince Tieri for the money and I am going to continue to do so." With an attitude like that and as reflected in the written documents prepared and signed by Dunn, states the District, a good case could be made for dismissal. This type of misconduct, asserts the District, cannot be tolerated in a school district or by any employer.

For months and months, according to the District, Dunn openly defied the directives of his superiors and engaged in acts of blatantly insolent behavior such as calling into question the Christianity of Principal Young, accusing Young of harassment, calling Department Chair Tieri, a respected and experienced educator, "boy" and month after month daily harassing Tieri with statements like "Where is my money, boy?, Be a man, you are not a man," and calling him a "thief" in writing.

This sort of conduct simply cannot be tolerated, states the District. Frankly, warns the District, if Dunn continues on this course of conduct the five-day suspension will serve as a stepping stone toward his eventual dismissal because things can't go on like this.

The evidence, continues the District, clearly shows by a preponderance of the evidence that as alleged in Charge No. 1,

which, upon oral motion of the District, was consolidated with Charge No. 2, Dunn was warned both orally and in writing on October 28, 1992 to cease and desist harassing Department Chair Tieri, making a public issue out of the budget dispute and discussing it with students all of which are highly unprofessional. Nonetheless, asserts the District, Dunn continued his pattern of misbehavior for several months thereafter until his suspension and thereupon advised Principal Young he would persist in his misconduct.

The evidence furthermore shows, states the District, as alleged in Charge No. 3, that during the course of the October 28 meeting Dunn defiantly told Principal Young he was going to speak to anyone he wanted to about anything he wanted thereupon asserting freedom of speech and First Amendment rights.

Needless to say, argues the District, external law does not extend to protecting defamatory statements or statements regarding subjects which are appropriately dealt with in a confidential manner. Accusations that Department Chair Tieri stole money and was a thief in violation of the public law is not a proper subject for discussion with parents on back to school night, with students in the classroom or for ridicule of a fellow educator in the classroom. These are outrageous acts of misconduct, states the District, which easily justify a five-day suspension.

Charge No. 4, continues the District, has been proven by a preponderance of the evidence. According to the District, Dunn circulated a petition resurrecting the $150 issue in violation of directives not to do so

by Principal Young. The District asserts such misconduct is unprofessional even if Dunn had not been directed by Principal Young to cease doing so. It is also improper conduct, contends the District, by any sense of common decency.

Charge No. 5, notes the District, relates to events discussed during the January 28 meeting regarding a Rebel Sports letter which accused Principal Young of discrimination. The testimony shows, argues the District, the letter in question was distributed to local business owners and members of the community. The District adds Dunn admits he distributed the letter in question at his retail establishment, Rebel Sports. According to the District, under Connick v. Myers and other federal cases, the personal grievances and complaints of Dunn which are voluminous are issues not protected by the First Amendment since they do rise to the level of matters of public concern.

The District accordingly reasons Dunn's Insults, defamatory statements, attacks and outrageous insolence directed at other educators and superiors are therefore not protected by the First Amendment in the context of Dunn's personal complaints about the $150 issue or some other issues.

Regarding Charge No. 6, the District states Dunn claimed responsibility for the Superintendent, a principal and a teacher leaving District employment. Dunn then threatened Principal Young, argues the District, that he would be next and Dunn would remain employed by the District long after Young was gone.

Charge No. 7, notes the District, relates to events which occurred in late February 1993. Once again, states the District, Principal Young sat down with Dunn and directed him to cease and desist from harassment of Department Chair Tieri. In his own testimony, notes the District, Dunn admitted he received oral directives of a similar nature from Principal Young earlier in the school year. The District argues Dunn was told on February 23, 1993 if the harassment continues he may face serious disciplinary action including suspension without pay. Dunn was told, states the District, if he continued his misconduct he would be suspended or perhaps worse. It didn't take but one day, asserts the District, for Dunn to willfully and deliberately violate the directive of February 23, 1993. The very next day, according to the District, Dunn confronted Tieri in a hostile manner as reflected in Tieri's testimony and in the statement of Murphy submitted as Attachment 4 to Joint Exhibit 10. The District notes Dunn became confrontational and stated "Where is my money? Am I going to get my money'." When Principal Young held another meeting with Dunn on March 1 to discuss the February 24 incident, Dunn admitted he was continuing to try to get the $150 from Tieri and he would continue to do so in the future. That, states the District, is blatant insubordination--plain and simple.

Charge No. 8, states the District, alleges during the course of the February 23 meeting between Dunn and Young that Dunn threatened to picket Young's church to show the congregation Young was a lousy

Christian supporting a teacher who took money from students.

This is what Dunn was saying, rotes the District, almost a year after the events giving rise to this "Mickey Mouse" $150 issue. Dunn's statement also occurred four months after Principal Young told him to "lay off." Dunn, argues the District, basically laughed in Principal Young's face when Young admonished Dunn for his continual harassment of Tieri.

Finally, Charge No. 9, states the District, alleges during the course of the March 1, 1993 meeting Dunn readily admitted questioning Department Chair Tieri about the money on February 24 and stated, "I am going to continue to do so just as I have done in the past four months." According to the District, Dunn added, "I will get the money back one way or another." The District notes Dunn takes exception to that statement in his March 3 response. According to the District, however, Dunn admitted in his response saying "Yes, I was going to get the money back."

Dunn denied, however, states the District, saying "one way or the other." The District argues Dunn's denial of saying " one way or the other" makes little difference.

The point is, according to the District, he told Principal Young eyeball to eyeball, "I'm going to continue to talk with Mr. Tieri to get my money back." Finally, observes the District, upon Principal Young, with understandable frustration, again warning Dunn about the disciplinary consequences of his misconduct, Dunn defiantly responded, "Then why don't you fire me?" The statement of charges drafted by

Assistant Superintendent, Personnel Services Campbell concludes with these VOZ'ds: " Your continual harassment of Mr. Tieri in direct violation of a principal's orders and your insolent and disrespectful attitude toward the principal constitute just cause for your suspension."

The District states the above-quoted language is succinctly stated and if the administration should be faulted it is for being too patient with Dunn and perhaps issuing too light a penalty in the form of a suspension for such outrageously unprofessional misconduct over such a protracted period of time-The grievance, concludes the District, has no merit what so according to the District, the conduct of Dunn more than justifies just cause for the five-day suspension. The District accordingly urges the Arbitrator to affirm the decision to suspend Dunn for five days and deny the grievance.

B. Arguments on Behalf of Dunn

In its turn, the Association vigorously contends the District lacked just cause to suspend Dunn for five days. According to the Association, all but two of the allegations in question arise from Department Chair Tieri's failure to roll over to the succeeding school year a $150 balance from Dunn's 1991-92 supply fund allowance and Dunn's subsequent protests in that regard.

According to the Association, serious due process violations requiring the immediate reversal of all discipline in question resulted from the District's inadequate notification to Dunn of the District's

expected standards in this regard. Pursuant to time-honored due process standards inherent to the principles of just cause, strongly asserts the Association, the District was required to first clearly advise Dunn what conduct was expected of him as a member of the certificated bargaining unit and the progressive disciplinary consequences which may follow from a violation of those expectations. In the instant case, states the Association, Dunn was inadequately advised of what the District's expected standards were.

According to the Association, following meetings with Principal Young Dunn reasonably understood the District was less than pleased over Dunn's communications with students regarding the supply allowance issue. The District neglected to advise Dunn, argues the Association, it also prohibited him from communicating with his Department Chair regarding the issue. Thus, contends the Association, following the October 28, 1992 meeting with Principal Young, Dunn was only on notice the District prohibited him from speaking to students regarding the supply allocation issue. Dunn was not similarly admonished, asserts the Association, from speaking with Department Chair Tieri regarding this vital issue of education.

With regard to Dunn's subsequent communications with students and the public, the Association vigorously contends the Arbitrator must be guided by important constitutional principles. Based upon such considerations, argues the Association, the District's unlawful attempt to discipline and

hence censor Dunn in contravention of his First Amendment rights must be struck down.

In evaluating this case, urges the Association, the Arbitrator must be mindful of the context in which Dunn exercised his right of free speech. The District's Special Education program, notes the Association, has historically required a substantial volume of communication between its Special Education teachers and the community. Dunn's communications were accordingly, states the Association, in keeping with the District's expected standards of communication with the community. In Dunn's case, argues the Association, he was particularly involved with the community as both a Special Education teacher and businessman who financially supported Jurupa Valley High School.

Dunn's responsibilities as a Special Education teacher, asserts the Association, thus require communication and discussion with the community regarding he District's Special Education program. The Association particularly emphasizes the sincerity of Dunn's conviction that Department Chair Tieri had wrongfully confiscated supply allowance funds designated for Dunn's students. According to the Association, funds which were vitally necessary to the successful fulfillment of the District's educational mission were wrongfully and wastefully denied Dunn's students. Following the District's October 28, 1992 admonition, according to the Association, Dunn confined his communications with students regarding the supply allowance issue strictly within First Amendment parameters. According to the Association, Dunn's communications

with students thereafter ceased with regard to any reference to Department Chair Tieri.

The Association contends Dunn should not be unfairly disciplined for standing his ground as a dedicated Special Education teacher and citizen in lawful protest of what he reasonably and sincerely perceived to be a legitimate grievance. According to the Association, charges of insubordination may not be properly sustained based upon Dunn's challenge to a deviation from established District policy.

The Association further disputes the charge that following the February 23, 1993 meeting with Principal Young Dunn thereafter spoke to Department Chair Tieri regarding the supply allocation issue. According to the Association, credible evidence supports the conclusion it was Department Chair Tieri who initiated the discussion with Dunn on February 24, 1993.

The Association accordingly reasons Dunn should not receive discipline due to Department Chair Tieri's instigation of a conversation with Dunn.

Finally, the Association contends the District's first clear delineation to Dunn of expected behavioral standards with regard to communications with Department Chair Tieri was not provided until delivery of the February 26, 1993 memorandum on March 1, 1993. Since communication to Dunn of expected standards was withheld by the District until March 1, 1993, argues the Association, the ex post facto application of those standards for conduct occurring on February 24, 1993 violates traditional standards of just cause. In view of the District's violation of

established procedures regarding the roll over of unused supply allowance funds, Dunn's protected free speech in protesting the District's violation of its established procedures in that regard and the District's failure to properly advise Dunn of expected standards of conduct in a timely fashion, the Association strongly argues the grievance must be sustained. The Association requests Dunn be awarded five days' salary with interest and the District be ordered to expunge the notice of suspension at issue and all related documents from Dunn's personnel file and all other District records.

DISCUSSION AND CONCLUSIONS

It is clear from a careful review of the record presented Dunn was warned by the District certain forms of conduct were prohibited and would result in serious disciplinary consequences if continued.

Thus, on October 28, 1992, Principal Young directed Dunn in writing not to discuss Department business with students or tell students and their parents Department Chair Tieri had stolen or taken money belonging to students. Furthermore, during a meeting between Dunn and Principal Young on February 23, 1993, Dunn was warned by Young to cease and desist harassing Department Chair Tieri.

Upon Dunn's behalf, however, the Association vigorously disputes the allegation Dunn thereafter-violated Principal Young's admonitions. The Arbitrator has carefully reviewed testimony and documentary evidence offered in these proceedings and concludes in this regard that despite Principal Young's admonitions during November and December 1992 Dunn persisted in harassing

Tieri publicly in the presence of students and staff on several occasions.

In this regard the Arbitrator particular notes Dunn's testimony on direct examination that he probably discussed the issue regarding his supply allowance with his students in class following Principal Young's admonition to cease doing so on October 28, 1992. During his testimony, Dunn also admitted to advising his students to go home and tell their parents to speak with Department Chair Tieri regarding the supply allowance issue. In discussing the supply allowance issue with students in the classroom and advising them to go haze and tell their parents to speak with Tieri on the subject, Dunn was clearly flaunting Principal Young's directive presented orally on October 28, 1992 and confirmed by memorandum of the sarge date.

Furthermore, the credible testimony of Department Chair Tieri supports the conclusion that during the months of November and December 1992 Dunn repeatedly inquired of Tieri "Where's my money, boy I am going to get my money back, boy." and Principal Young on February 23, 1993, Dunn was warned by Young to cease and desist harassing Department Chair Tieri.

Upon Dunn's behalf, however, the Association vigorously disputes the allegation Dunn thereafter-violated Principal Young's admonitions. The Arbitrator has carefully reviewed testimony and documentary evidence offered in these proceedings and concludes in this regard that despite Principal Young's admonitions during November and December 1992 Dunn persisted in harassing Tieri publicly in the presence of students

and staff on several occasions. In this regard the Arbitrator particular notes Dunn's testimony on direct examination that he probably discussed the issue regarding his supply allowance with his students in class following Principal

Young's admonition to cease doing so on October 28, 1992. During his testimony, Dunn also admitted to advising his students to go home and tell their parents to speak with Department Chair Tieri regarding the supply allowance issue. In discussing the supply allowance issue with students in the classroom and advising them to go hone and tell their parents to speak with Tieri on the subject, Dunn was clearly flaunting Principal Young's directive presented orally on October 28, 1992 and confirmed by memorandum of the sarge date.

Furthermore, the credible testimony of Department Chair Tieri supports the conclusion that during the months of November and December 1992 Dunn repeatedly inquired of Tieri " Where's my money, boy I am going to get my money back, boy."

In Dunn's defense, however, the Association strongly argues that during the October 28, 1992 conference Dunn was simply advised not to discuss departmental business with students. According to the Association, Dunn was not advised to cease discussing the supply allowance issue with Department Chair Tieri. In addressing the Association's argument in this regard, however, the Arbitrator notes that according to the reliable testimony of Principal Young Tieri's complaints regarding harassment of himself by Dunn were fully discussed with

Dunn during their October 28, 1992 meeting. According to Principal Young's testimony, two specific incidents regarding Tieri's allegations were discussed. The first such incident occurred during the day of " Back-to-School" night while the second episode discussed occurred the subsequent day. According to Principal Young, he thereupon advised Dunn that Tieri had proceeded appropriately in spending the remaining supply funds in question.

Principal Young furthermore stated to Dunn he could avail himself of the District's complaint procedures pursuant to Board of Education policy if he wished to contest that decision. The Arbitrator therefore concludes by continuing his verbal questioning of Tieri in November and December 1992 Dunn acted in violation of Principal Young's directive to cease making derogatory comments to Tieri regarding the supply allowance issue.

The District further charges during a meeting with Principal Young on January 28, 1993, Dunn admitted he circulated a petition to students regarding the supply allowance issue. According to the credible testimony of Principal Young, during their meeting Dunn stated that while he did not write the petition he supported it and it was available for signature in his store. Based upon the testimony of Principal Young, the Arbitrator concludes Dunn participated in circulating the petition in question thus violating Principal Young's earlier directive of October 28, 1992 to cease communicating with students regarding the supply allocation issue.

Upon careful consideration of the record, the Arbitrator furthermore concludes on February 24, 1993, at approximately 10:10 a.m. in the office at Jurupa Valley High School in the presence of a student and Guidance Coordinator Karen Murphy, Dunn confronted Tieri stating "Where's my money'. Am I going to get my money?" and repeated his accusation that Tieri had taken money that belonged to Dunn's students. The Arbitrator concludes Dunn's confrontation of Tieri regarding the supply allowance issue violated principal Young's earlier admonitions to cease harassing Tieri.

The District also charges Dunn was insubordinate to Principal Young upon several occasions during counseling sessions when Young advised Dunn to cease discussing the supply allowance issue with students and harassing Tieri. Upon a careful consideration of the record in this regard, the Arbitrator concludes during the beforementioned October 28, 1992 meeting between Principal Young and Dunn whereupon Young directed Dunn to not discuss department business with students, Dunn responded he would talk to anyone he wished to about anything he wanted to. Similarly, the District charges that during the conference of January 28, 1993, Dunn advised Principal Young he would be next to leave the District and furthermore added Dunn would be with the District long after Young was gone.

The District additionally charges on February 23, 1993, during a counseling session, Dunn threatened to picket Principal Young's church to show the congregation Young is a "lousy Christian, supporting a guy who took money from students." According to the

District, Dunn furthermore laughed at Principal Young upon being admonished for his continual harassment of Tieri.

Based upon Principal Young's testimony, the Arbitrator concludes during the February 23, 1993 meeting Dunn defiantly questioned Young's religious beliefs and called Tieri a "boy."

Based upon a careful review of the record presented, the Arbitrator concludes there is substantial evidence that Dunn, in response to Principal Young's repeated attempts to verbally counsel him, openly and defiantly rejected all attempts to advise him such misconduct was inappropriate and would, if continued, result in serious disciplinary consequences.

Thus, on October 28, 1992, in response to Young's admonition not to discuss department business with students Dunn stated he would talk to anyone he wanted to regarding anything he wanted. Again, during the meeting on January 28, 1993, upon Principal Young reminding Dunn circulation of a petition regarding the supply allowance issue was in violation of the direction previously given, Dunn responded Principal Young would be next to leave the District and Dunn would remain long after Young departed. Furthermore, during a February 23, 199' meeting between Principal Young and Dunn, Dunn questioned Young's religious beliefs and called Tieri a "boy." Finally, during a counseling session on March 1, 1993, Dunn stated he would continue to question Tieri regarding the supply allowance issue despite Principal Young's admonition to cease such conduct.

Dunn nevertheless defends his conduct on constitutionally protected free speech grounds. According to Dunn, in speaking to Department Chair Tieri and Dunn's students regarding the supply allocation issue and thereafter-resisting Principal Young's efforts to censor his speech, Dunn was exercising his First Amendment right to freedom of speech. The Arbitrator must now carefully consider Dunn's arguments in this regard.

The important subject of free speech by public employees has received considerable attention by the United States Supreme Court in recent years. Thus, in Pickering v. Board of Education,[3] the Supreme Court rejected the argument that public employment can be subject to conditions regulating free speech no matter how unreasonable those conditions may be.

The Court held that absent proof of false statements knowingly or recklessly made, "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[4] The Supreme Court, however, also recognized:

> It cannot be gainsaid that the State has interest as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of F391 U.S. 563 (1964) Id. at 574 the citizenry in general. The problem in any case

[3] 391 U.S. 563 (1964)

[4] Id. at 574.

> is to arrive at a balance between the interest of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[5]

In 1983 the Supreme Court revisited the subject of the free speech rights of public employees in Connick v. Myers.[6] In considering the discharge of an assistant district attorney for circulating a questionnaire concerning internal office matters, the Supreme Court stressed:

> [T]he repeated emphasis in Pickering on the right of a public employee "as a citizen, in commenting on matters of public concern," was not accidental.

The Court then noted that unlike the issues the assistant district attorney addressed, the subject matter in Pickering was "a matter of legitimate public concern" upon which "free and open debate is vital to informed decision-making by the electorate." The Court majority concluded:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which

---

[5] 391 U.S. at 568.

[6] 461 U.S. 138 (1983).

> to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.... Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not 391 U.S. at 568.461U.S.138(1983) afforded by the First Amendment to those who do not work for the state.[7]

While the line of demarcation between protected "matter[s] of legitimate public concern" on the one hand and unprotected "matters only of personal interest" on the other pursuant to Pickering and Connick may not be always clearly discernible, a careful consideration of the record leads the Arbitrator to conclude Dunn's expressions in this case fall squarely within the latter category.

In this regard it should be noted that according to Connick, a determination of whether a public employee's speech touches a matter of "public concern" is determined upon examination of the "content, form and context" of the statements. In this regard the Arbitrator observes the content of Dunn's speech concerned Department Chair Tieri's decision to dispense remaining supply funds during the 1991-92 school year rather than carry forward the balance for use during the succeeding year. Nothing in the record presented suggests any assertion by Dunn in

[7] 461 U.S. at 147.

his communications that the $150 in question was utilized unlawfully or diverted for personal use. An issue such as this regarding discretionary timing of supply purchases thus appears closer to an individual grievance than a matter o f "public concern. " Furthermore, the Arbitrator concludes Dunn's speech, particularly his repetitive questioning of Tieri regarding the supply allowance issue was designed to intimidate rather than impart information to the electorate regarding issues in the public interest. Moreover, much of Dunn's communications were made personally to Tieri and Young during private counseling sessions rather than to the public. The Arbitrator accordingly concludes based upon its content, form and context that Dunn's speech was not designed to enable the public to make informed decisions about the operation of their public school system.

In view of the fact Dunn's speech pertained to a matter of personal concern rather than a matter of public interest, the Arbitrator concludes it is unnecessary pursuant to Pickering to determine whether the interest of the agency in promoting the efficiency of the public service it performs outweighs Dunn's interest as a citizen.

For all the foregoing reasons, the grievance must be denied.

AWARD

The District did not violate Article V, Unit Member Rights, Section 4 - Just Cause, when it suspended grievant for five (5) days, without pay, from March 8, 1993 through March 12, 1993.

Dated: May 9, 1994

Del Mar, California

---

KENNETH A. PEREA Arbitrator

APPENDIX "A"

STIPULATION

The parties stipulate

1. KAREN MURPHY, if called and sworn as a witness, would testify as set forth on Exhibit 4 to Joint Exhibit 10.

2. ESTHER HOPPER, if called and sworn as a witness, would testify she was a student during the 1992-93 school year and sitting next to Mr. Dunn when he and Mr. Tieri spoke to one another on February 24, 1993 outside the Xerox room at approximately 10:10 a.m. Mr. Tieri initiated the conversation by telling Mr. Dunn that he was not going to get the money back. The conversation was not loud

3.She left for reasons unrelated to what was being said by Mr. Dunn and Mr. Tieri to attend a meeting with Mr. Ernie Garcia, Guidance Coordinator.

4.ERNIE GARCIA would state regarding this conversation that it was in a normal conversational voice. Ms. Hopper was sitting next to Mr. Dunn. Ms. Hopper left bench to enter a meeting with him.

5. JOE ARZOLA (phonetic), a student, would testify he was sitting between where Mr. Tieri was. He would corroborate the testimony of Ms. Hopper.

Fee Exemption: Govt. Code 6103
HECTOR E. SALITRERO STATE BAR NO. 81186
SHERRY G. GORDON STATE BAR NO. 119804
HOWARD J. FULFROST STATE BAR NO 176498
Member of ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A Professional Corporation
348 West Hospitality Lane, Suite 202
San Bernardino, California 92408
(909) 888-4165
Attorneys for Real Parties In Interest
JURUPA UNIFIED SCHOOL DISTRICT, et al.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE

CHUCK DUNN
Petitioner,

V.

THE COMMISSION ON PROFESSIONAL COMPETENCE,

Respondent.

JURUPA UNIFIED SCHOOL DISTRICT, SANDRA RUANE, MARY BURNS, HOLLY HANKE, JOHN CHAVEZ, and SAM KNIGHT, Real Parties In Interest.

CASE NO. 266160

[Proposed] STATEMENT OF DECISION

Judge Stephen D. Cunnison

Department 7

Hearing Date: 5/31/96

Hearing Time: 8:30 a.m.

This matter came on regularly for hearing on May 31, 1996, in Department 7 of this court, the Honorable Stephen D. Cunnison, presiding, regarding petitioner, Chuck Dunn's (hereinafter 'Petitioner' ) petition for issuance of a writ of mandate regarding his dismissal from employment by Real Party in Interest, Jurupa 'Unified School District, (hereinafter " Real Party" ) , pursuant to Education Code sections 44932 and 44945, as decided by Respondent Commission on Professional Competence.

(hereinafter 'Respondent").

Petitioner appeared by and through his counsel of record, Gregory W. Brittain, of the Law offices of Gregory W. Brittain.

Real Party appeared by its counsel of record, Hector E. Salitrero, Atkinson Andelson Loya Ruud & Romo.

The pleadings, exhibits, and supporting declarations submitted therewith, including the transcript of the underlying hearing, having been received and reviewed by the Court, arguments having been presented, and the matter having been submitted for decision, the Court makes the following statement of decision in support of its denial of a preemptory writ of mandamus:

1. A principal controverted issue raised by the Petition and response thereto was whether, upon a review based upon independent judgment pursuant to California Education Code section 44945, the evidence produced in the course of the hearing conducted before Respondent pursuant to California Education Code section 44944, supported Respondent's finding of cause for the dismissal of Petitioner on the basis of immoral conduct pursuant to Education Code section 44932 (a)(1).

The Court has determined, based upon its independent judgment and review of the evidence, that cause exists for the dismissal of the employment of Petitioner on the basis of his engagement in immoral conduct as set forth in the Statement of Charges which served-as-the accusation in the proceedings below (hereinafter "Accusation"), specifically, cause has been shown, by a preponderance of the evidence, that Petitioner engaged in the conduct alleged in Charges 11, 13, 171 18t 19, and 20, as supported by Respondent Findings 23, 27, 29, 30, 32, 35, 37, and 40, which are incorporated herein by reference.

2. A principal controverted issue raised by the Petition and response thereto was whether, upon a review based upon independent judgment pursuant to California Education Code section 44945, the evidence produced in the course of the hearing conducted before Respondent pursuant to California Education Code section 44944, supported Respondent's finding of cause for the dismissal of Petitioner on the basis of evident unfitness for service pursuant to Education Code section 44932 (a) (5).

The Court has determined, based upon its independent judgment and review of the evidence, that cause exists for the dismissal of the employment of Petitioner on the basis of his engagement in conduct demonstrating that he is evidently unfit for service, as set forth in the Accusation, specifically, cause has been shown, by a preponderance of the evidence, that Petitioner engaged in the conduct alleged in Charges 5, 61 11, 13, 17, 18, 19, 20, 21, 35, 36, and 37, as supported by Respondent's Findings 10, 11, 12, 22, 23, 25, 26, 29, 30, 31,32, 35, 37, and 40, and by the legal authority cited in Respondent's decision of April 21, 1995, all which are incorporated herein by reference.

3. Principal controverted issue raised by the Petition and response thereto was whether, upon a review based upon independent judgment pursuant to California Education Code section 44945, the evidence produced in the course of the hearing conducted before the Respondent pursuant to California Education Code section 44944, supported Respondent's finding of cause for the dismissal of Petitioner on the basis of dishonesty pursuant to Education Code section 44932 (a)(3).

The Court has determined, based upon its independent judgment of the evidence, that cause exists for the dismissal of the employment of Petitioner on the basis of his engagement in conduct demonstrating Petitioner' s dishonesty, as set forth in the Accusation, specifically, cause has been shown, by a preponderance of the evidence, that Petitioner engaged in the conduct alleged in Charges 5, 6, 11, 13, 17, 18, 19, 20, 21, 371 supported by

Respondent's Findings 12, 23, 27, 29, 30, 411 431 and 48 and by the legal authority cited in said decision, all which are incorporated herein by reference.

4. A principal controverted issue raised by the Petition and response thereto was whether, upon a review based upon independent judgment pursuant to California Education code section 44945, the evidence produced in the course of the hearing conducted before the Respondent pursuant to California Education Code section 44944, established that Petitioner's constitutional right to free speech was violated by the conduct of Real Party. The Court has determined, based upon its independent judgment and review of the evidence, that Petitioner' s free speech rights were not violated for the reasons set forth in the Respondent' s Determination No. 5, which is incorporated by reference.

5. A principal controverted issue raised by the Petition and response thereto was whether, upon a review based upon independent judgment pursuant to California Education Code section 44945, the evidence produced in the course of the hearing conducted before the Respondent pursuant to California Education code section 44944, established that Petitioner' s constitutional right to due process was violated due to the Respondent' s alleged findings in excess of the allegations contained in the Accusation.

The Court has determined, based upon its independent judgment and review of the evidence; that Petitioner' s Due Process rights were not violated as the Accusation provided Petitioner with sufficient notice of the charges against him and Petitioner was



BEST AVAILABLE COPY

not deprived of the ability to present a defense thereto.

6. A principal controverted issue raised by the Petition and response thereto, but later abandoned by Petitioner, was whether, upon a review based upon independent judgment pursuant to California Education Code section 44945, the evidence produced in the course of the hearing conducted before the Respondent pursuant to California Education Code section 44944, established that Petitioner's right to equal protection was violated due to the Respondent's exclusion of evidence regarding the alleged selective prosecution of Petitioner by Real Party.

The Court has determined, based upon its independent judgment and review of the evidence, as well as Petitioner's abandonment of the issue, that Petitioner's Equal Protection rights were not violated for the reasons set forth in Overturf v. California Horse Racing Board (1978) 86 Cal.App.3d 979, 150 Cal.Rptr. 657, People V. Smith (1984) 155 Cal-App.3d 1103, 203 Cal.Rptr. 196, and Erlich v. McConnell (1963) 214 Cal.App.2d 280, 29 Cal.Rptr. 283. APP. 68

7. A principal controverted issue raised by the Petitioner during oral argument was whether the California Evidence Code is applicable to proceedings under California Code of Civil Procedure 1094.5. The Court has determined that the California Evidence Code is applicable to proceedings under California Code of Civil Procedure 1094.5, pursuant to California Code of Civil Procedure sections 307 and 1109; and California Evidence Code section 300.

8. A principal controverted issue raised by the Petition and response thereto was whether, upon a review based upon independent judgment pursuant to California Education Code section 44945, the Respondent properly excluded evidence proffered by Petitioner regarding Petitioner's claims of deprivation of equal protection due to selective prosecution and deprivation of First Amendment free speech rights.

The Court has determined, based upon its independent judgment and review of the evidence, that the Respondent properly excluded the proof offered evidence regarding Petitioner' s claims of deprivation of equal protection due to selective prosecution and deprivation of First Amendment free speech rights, on the basis, among others, of relevance and undue consumption of time.

9. A principal controverted issue raised by the Petition and response thereto was whether, upon a review based upon independent judgment pursuant to California Education Code section 44945, the evidence lodged by Petitioner with the Court after the filing of the instant Petition, which related to events that occurred after the Respondent' s decision in this matter, or to evidence preferred by Petitioner regarding his claims of deprivation of equal protection (selective prosecution) or free speech, was relevant to the consideration of the instant Petition.

The Court has determined, based upon its independent judgment and review of the evidence, that the referenced lodged evidence is irrelevant and therefore properly excluded from consideration regarding the Courts' decision in the instant Petition.

10. The Court finds, in the exercise of its independent judgment, that all factual determinations of Respondent are supported by the weight of the evidence, and that all of its legal rulings were correct. Thus the Court finds that the Respondent' s conclusory determination (No. 6) that, based on the totality of the circumstances presented to Respondent, that Petitioner should be dismissed under Education code sections 44932 (a) (1) 44932 (a) (3), 44932 (a) (5), and 44944 (c) is deemed proper, so the writ prayed for is denied.

SO ORDERED.

Date June 26, 1996

Stephen D. Cunnison

Judge of the Superior Court

NOT TO BE PUBLISHED

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

CHUCK DUNN,
Plaintiff and Appellant
v.
COMMISSION ON PROFESSIONAL COMPETENCE,
Defendant and Respondent;
JURUPA UNIFIED SCHOOL DISTRICT,
Real Party in Interest and Respondent.

---

E019255
(Super.Ct.No. 266160)

OPINION

APPEAL from the Superior Court of Riverside County. Stephen D. Cunnison, Judge. Affirmed.

Gregory W. Brittain for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Atkinson, Andelson, Loya, Ruud & Romo, Stephen J. Andelson, Robert L. Sammis and Warren Kinsler for Real Party in Interest and Respondent.

Plaintiff and appellant Chuck Dunn is a high school special education teacher.

In 1992, Dunn embarked on a long simmering humid with his immediate superior, Vincent Tieri, and the school principal, Alan Young, over $150 in supply funds which Dunn believed Tieri had improperly commandeered. Dunn took to calling Tieri a thief, an Young a liar and coward. In March 1993, he was suspended for insubordination. Nevertheless, when he returned, he continued to make similar comments which Young and Tieri found offensive. He shared internal memos, which had been marked "confidential," with other teachers and with a newspaper reporter.

In October 1993, a student, Nancy W., claimed Dunn had been sexually harassing her and had both her and her boyfriend watched and followed. Young promptly suspended Dunn.

After a hearing, a Commission on Professional Competence found Nancy's claims that Dunn had a sexual or romantic interest in her and he had her and her boyfriend followed "not established." Nevertheless, it found Dunn's actual involvement with Nancy -- which included giving for the keys to his house and his car; having her added to his car insurance policies; taking her on day trips to Cabazon, Costa Mesa, and San Diego without her parents' knowledge; buying her expensive presents; surreptitiously checking up on her and her boyfriend; and threatening her boyfriend -- constituted good cause for his dismissal. It also found good cause for his dismissal based on dishonesty and based on his conduct toward Young and Tieri.

Dunn filed a petition for writ of mandate, but the trial court adopted all of the

Commission's findings and denied the petition.

Dunn appeals, contending:

1. The Commission's findings are not supported by the evidence.

2. The Commission's conclusion that dismissal was proper is not supported by the findings; or, alternatively, Diamond did not have sufficient notice that his conduct was prohibited to satisfy due process.

3. The Commission erroneously alive and evidence outside the statement charges.

4. The Commission erroneously excluded evidence.

5. Dunn was actually dismissed in retaliation for the exercise on his First Amendment rights.

6. The trial court erroneously excluded evidence not in the administrative record.

7. The trial court erroneously denied Dunn's motion for new trial, which was based newly discovered evidence.

We find no prejudicial error, and we affirm.

I

FACTUAL BACKGROUND

gone first went to work -is a teacher for the Jurupa Unified School District (District) in 1980. Around 1986, he was assigned to Jurupa Valley Junior High. While there, he became embroiled in a series of disputes with the principal, Linda Lenertz. First, she tried to end his use of student aides; he appealed, successfully, to the school board. When the school's name was changed to Jurupa Middle School, Dunn helped to organize an

opposition movement among parents and students. This led to the formation of a political action committee called K.I.D.S., which caused the defeat of three incumbent school board members in the next election. Then, when the school canceled the annual graduation dance, Dunn was instrumental in arranging an alternative dance.

In September 1989, Jurupa Valley High School opened. Its principal was Alan Young. The head of its Special Education Department was Vincent Tieri. Dunn was transferred to Jurupa Valley High School as a special education teacher. Also around 1989, Dunn opened Trouble Sports, a stateboard-oriented sporting goods and clothing store.

*A. Dunn's disputes with Young and Tieri.*

At the beginning of the 1991-1992 school year, each Special Education teacher received $400 for supplies. On January 14, 1992, Tieri told all Special Education teachers any supply funds not spent by April 3, 1992, would revert to the department. Dunn complained to both Young and Tieri about this, but without success.

On March 27, 1992, the District issued a memorandum regarding "Special Education Budgets" which stated: "To discourage unnecessary purchases and encourage savings, starting with the 1991-92 year, $51 or more of unexpected allocations will be carried over....Any dollar amount of less than $51 would not be carried board."

When the deadline arrived, there was $150 left in Dunn's supply allocation. Tieri to be $150 and spent it.

Dunn refused to accept Tieri's action. He challenged Tieri about it repeatedly

throughout the 1992-1993 school year. A among other things, he sent Young a memo calling Tieri a thief. As a result, Dunn was suspended without pay from March 8 through 12, 1993. On March 15, 1993, he filed a formal grievance over the suspension. Ultimately, the suspension was upheld by a neutral arbitrator. The arbitrator also ruled Dunn's conduct was not protected by the First Amendment because it "pertained to a matter of personal concern rather than a matter of public interest ...."

On March 15, 1993, the day Dunn returned from his suspension, Tieri visited his classroom to discuss various administrative matters. Sharon Huey, his instructional aid, accompanied him. Dunn's own instructional aid and several students were also in the classroom. As Tieri was leaving, Dunn said something Tieri could not hear. Tieri said, "I'm sorry?" Dunn replied, "you should be sorry. You owe me $1,500." Apparently this referred to the wages he lost during his suspension.

On April 9, 1993, Young sent Dunn in memo, stamped "confidential," in which he directed Dunn not to: (1) discuss the budget issue, his suspension, Young's religious beliefs, (2) harass Tieri, (3) harass Young, "including but not limited to threatening or disrespectful statements, picketing my church, or calling my relatives," or (4) reveal confidential information.

In response, one April 28, 1993, Dunn sent Young a lengthy and vituperative memo. It called Young a liar; it also said, among other things, "[Y]ou do not understand the essence of Christianity. If you did, you would treat everyone equal. A real man would

treat everyone equal." "I question your manhood and your Christian practices." "Are you so ashamed of your own actions that even your own family must be kept in the dark?" "The people... should know all about your favoritism and discrimination. I realize that would prove very shameful to you." "Too bad you are ashamed and afraid to let people know how unwise and unfair your actions are." "You are a coward."

Some time before October 5, 1993, Dunn gave confidential memos "in regard to himself and other district employees" to other teachers. Dunn also revealed the contents of memos that had been marked "confidential" with a reporter for the Riverside *PressEnterprise*. The District had no written policies with respect to what documents should be marked "confidential." Dunn believed he was free to waive the confidentiality of his own personnel information.

Young told Dunn more than once not to give confidential memos to third parties. Dunn responded that he had a First Amendment right to do so.

On October 5, 1993, during a meeting, Dunn told Young, "[W]hat goes around comes around"; "[Y]our private life is known better than you think and, "[W]e'll see how long they keep you." Dunn also referred to the fact that Young owned a condo in the desert. Young took these comments to be threats.

*B. Dunn's Involvement with Nancy W.*

Nancy W. first met Dunn when she attended Jurupa Middle School and he was a teacher there. She also knew him through Rebel Sports, where her brother Alan worked.

In fall 1990, Nancy entered Jurupa Valley

High School, where she re-encountered Dunn. In her sophomore year, she worked at Rebel Sports for about three months. Although Dunn was never her teacher, he began helping her with her homework.

In the summer of 1993, Nancy occasionally visited Dunn's house. According to Nancy, she did not want anyone to see her car; Dunn told her to park in the garage or in the back. Dunn denied this, although he admitted Nancy was worried about her brother learning where she was. Dunn's girlfriend, Heather Craigmyle, also denied this.

According to Nancy, Dunn gave her the key to his house and the security code his home alarm system. Sometimes she let herself into the house when he was not the Both Dunn and Heather denied this.

Heather and Dunn spent nights together, but did not live together. Heather was country music singer (known professionally as Heather Myles), and so was often awai the road. Nancy testified she never met Heather. Heather, however, testified she was present during several of Nancy's visits to Dunn's house.

*1. Dunn's Gifts and/or Loans to Nancy.*

Dunn gave Nancy a locking doorknob for her bedroom door. The key to his front door would also work the lock on the doorknob. According to both Dunn and Heather, Nancy asked Dunn for a lock to keep her brother from snooping around 'in her room. He had just changed the locks at his house; as a result he had a spare locking doorknob, which he gave her. Nancy admitted Dunn gave her the lock "so I could keep my brother out."

In July or August 1993, Dunn and Nancy had dinner together at the Sizzler in Bernardino

and at Socorro's Mexican Food in Rancho Cucamonga.

On July 21, 1993, Dunn and Nancy went shopping at South Coast Plaza, When bought her $125 worth of clothes.

On August 10, 1993, they went shopping at the factory outlet stores in Cabazo where Dunn bought Nancy $3 10 worth of clothes and other goods.

On August 23, 1993, they visited San Juan Capistrano. They also went to South Coast Plaza again, where Dunn bought Nancy almost $165 worth of tapes. That night they had dinner together at Clearman's North Woods Inn in Covina.

On August 25, 1993, Dunn and Nancy visited Oceanside and San Diego, including the San Diego Zoo.

On August 29, 1993, they went shopping in Palm Springs. Dunn bought Nancy $649 worth of goods, including a radio, a clock, and a vanity mirror. They went shopping again on August 30, when Dunn bought Nancy some hardware for her dresser; and on August 31, when he bought her a lamp.

Dunn gave Nancy a check for $300, and another check for $200. In addition, he gave her a blank check to pay the tuition for a class she was going to take at Riverside Community College.

According to Dunn, these purchases and checks were part of a loan. In July 1993, Nancy had been in a car accident; she had had to pay for the damage to the car. According to Dunn, she also needed school clothes. At her request he agreed to lend her up to $3,500. She agreed to repay him by working at Rebel Sports.

Nancy testified most of the things Dunn bought her were gifts, although she admitted "some of the shopping sprees...were loans." Dunn never asked her to repay him. She had no expectation she would have to repay the loans and did not keep track of them. However, she admitted she did keep receipts for things he had bought her, "Just so that if Mr. Dunn came back and said, 'Oh, you owe me all this money and everything,' that I would know at least some of the things he had bought me and the amounts." Nancy also admitted, "When he was loaning me money and buying me things, I told him that I would work ... at Rebel Sports to pay it off, but I really had no intention of doing that."

Nancy told a friend Dunn was lending her money because of the accident and she was going to pay him back. Dunn similarly told several people he had lent Nancy $3,000 to fix her car.

Nancy testified her parents did not know about her trips with Dunn. She kept the trips secret from them, "[b]ecause they wouldn't like that." Dunn admitted he did not discuss the trips with Nancy's parents. He also admitted he did not discuss any loan with them.

Nancy admitted she kept up her relationship with Dunn "[b]ecause he gave me things"; she was "in it just for the greed." Nancy told a friend she was "just taking [Dunn] for a ride."

*2. Nancy's Use of Dunn's Cars.*

Dunn gave Nancy the keys to his Honda del Sol and-let her use it on several occasions.

Nancy wanted to attend North High School. She asked to borrow Dunn's car to go there.

Dunn agreed she could borrow his Honda Prelude. According to Nancy, he told her "he was going to get [her] on his [car] insurance . According to Dunn, however, he agreed to let Nancy use his car on condition her father obtained insurance coverage for her. In the end, Nancy did attend North High, but only for one day.

Dunn's auto insurance agent was Vicki McIntyre. On September *21*, 1993, a man called her company and asked to have Nancy added to the policy on Dunn's Honda Prelude. This could be done over the phone, but only by the named insured. The man who called provided Nancy's driver's license number and date of birth. He also provided information about Heather, including the fact that she owned two vehicles, a Mercedes and a BMW, which were insured by another company.

McIntyre called Dunn back and asked what his relationship was to Nancy. She explained Nancy could not be added to his policy unless she lived with him. Although McIntyre did not specifically recall Dunn saying Nancy lived with him, "he would have had to indicate that because I wouldn't ever add a driver who didn't reside in the home."

McIntyre needed a copy of Nancy's report card to see whether a good student discount applied. On or about October 14, 1993, she received a copy of Nancy's report card, with Nancy's address crossed out and Dunn's address written in. Dunn admitted the changes were in his handwriting.

On November 12, 1993, Dunn left a message asking McIntyre, "Did Nancy [W] get added?" McIntyre left a message for him saying she had been added. Dunn also told Nancy she had

been added.

Dunn claimed he merely asked McIntyre if Nancy's father could pay to have her added to his insurance policy. Then, in November 1993, he received an invoice indicating Nancy had been added. He claimed he called McIntyre and asked, "How did she get added to my policy?" McIntyre told him a man had called and asked that Nancy be added. Dunn denied being the man who had called; he assumed the man was Nancy's father. He also denied that Nancy ever gave him her driver's license number.

*3. Dunn's Car Ride With Sciortino.*

In June *1993*, Nancy began dating Aaron G. Dunn claimed she did not tell him bout Aaron until August When she did, he told her "[she) shouldn't be hopping into bed with anybody."

Charles Sciortino was Dunn's friend and neighbor. In the summer of *1993*, he was n training to become a police officer. Once, Dunn asked Sciortino to run a DMV or criminal records check on someone. Sciortino was willing, but not able, to do this, because he was not yet a police officer.

Some time in the summer of *1993* Dunn asked Sciortino to drive him past Nancy's house. He said he was worried that she was going to get together with an ex-boyfriend. She added she would not recognize Sciortino's car. Sciortino agreed, and drove Dunn past he house. Actually, it was Aaron's house.

On the way back, Dunn said he saw Nancy's car parked in front of the public library. He asked Sciortino to circle the block. When Sciortino did so, Dunn said, "There she is. She's sitting on the steps with some guy." The girl he pointed out was Nancy. Dunn then said he was going to go back to the library

in his own car. Nancy and Aaron both testified they were on the steps of the library at about 10 o'clock one night when Dunn came walking by.

Dunn admitted he was concerned about Nancy dating Aaron because Aaron was involved with drags. He claimed he took the trip with Sciortino to show him where Aaron and a second drug dealer lived. He did not recall ever going by the library when Nancy and Aaron were there.

*4. Mandy's Phone Calls to Aaron.*

Mandy U. knew Dunn from Jurupa Middle School and from Rebel Sports. Mandy and Nancy knew each other from junior high. Mandy attended Jurupa Valley High school through the 1991-1992 school year, then dropped out.

In June 1993, Dunn gave Mandy Aaron's phone number. He asked her to call it to nd out who lived there, and to get any other information she could.

In August 1993, Dunn asked Mandy to call Aaron again. He said he wanted to show a female friend of his that her boyfriend "wasn't as truthful or faithful as she thinks." He told Mandy to use an assumed name, and to try to get Aaron to flirt with her. [e also gave her the name of Aaron's English teacher so she could pretend she was in his lass. Later, Dunn asked Mandy to find out where Aaron lived, what he did during the day, and what kind of car he drove.

According to Mandy, she called Aaron, using the name "Lisa." She asked where t worked, if he was still going to North High School, if he had a girlfriend, and if she should meet him. Some time later, she told Aaron who she really was.

According to Aaron, a girl who identified herself as "Kerry" called him and tried D flirt with him. A girl named Kerry worked at Rebel Sports. Eventually, Aaron found out the caller was really Mandy.

The real Kerry was present when Mandy played a tape of one of her calls to Aaron or Dunn to hear. In it Mandy said, "Hi, Aaron. This is Mandy"; she asked Aaron questions about Nancy.

Dunn denied asking Mandy to call either Nancy or Aaron anytime prior to October 1, 1993. He emitted that, in 1994, he asked many to call Aaron, but only because the two were already talking regularly, and because Mandy said Aaron was involved with drugs. Dunn claimed Mandy confirmed this involvement, and he passed this information along the police.

*5. Telephone calls on October 1 and 2, 1993.*

October 1, 1993, at Dunn's request, Mandy called Aaron. She told him to watch out because Dunn had two men outside his house, watching him; they had guns, and they were going to beat him up a shoot him. Aaron looked out the window and saw two men in a car.

Aaron called Dunn. In this conversation, Dunn said, "I love [Nancy], I will do anything for her. If I have to, I will kill you to get you out of the way. This is no game, this is real. I have done it before and I will do it again. I grew up in El Monte, and it[']s really bad out there. I can have you and your family killed. You have much more to lose than I do. Do you really think Nancy is worth it all? This is the last time I will ever talk to you because

if I have to, I will go down there and do it right now. You have five sisters, you have a mother and you have a father and I know about the rest of your family." Aaron admitted, however, some portions of the conversation were "calm."

Aaron called Nancy and told her what Dunn had said. Nancy called Mandy. Mandy then called Aaron again, and told him she was afraid of Dunn.

The next day, Dunn called Aaron. He said, "Aaron, you are in big trouble. You should not have told [Nancy] all of the things you told her." Aaron's mother grabbed the phone and yelled at Dunn, Then Nancy took the phone and told Dunn to leave Aaron alone.

Dunn testified that on October 1., Nancy called him and told him that "Aaron had two guys outside my house to get me." He looked outside, but did not see anything Next, Kerry called him; she said Nancy had told her Aaron had two guys outside Dunn's house who were going to shoot him. Finally, Aaron called him, and asked, "What do you have guys in front of my house watching me for?" Aaron said Nancy had told him this. Aaron said he had "guns armed and ready." Dunn was angry and said he could "take care' of Aaron. After a while, they both calmed down. Aaron mentioned that Kerry had been calling him. Dunn said that didn't sound like something Kerry would do; he offered to have her call Aaron so he could see if her voice was the same.

At Dunn's request, the real Kerry called Aaron. When he heard her voice, he agreed she was not the girl who had been calling him; "it's some other girl named Kerry or somebody

acting as you.... "

The next morning, Nancy called Dunn. She was upset that Dunn had talked to Aaron about her. She indicated Aaron was going to "get" Dunn. Dunn therefore called Aaron. He admitted saying, "Aaron, you are in big trouble," and "you should not have told [Nancy] all the things you told her." He denied saying, "I asked you not to call her anymore." Aaron's mother grabbed the phone and told him not to call again. Dunn replied, "That's fine with me."

*6. Further Events of October 1993*

In October 1993, Dunn had Mandy call Nancy to see whether she was home Mandy also continued to call Aaron, Once, she told him it was Nancy who had put her up to calling him. Later, she denied this and said it was Dunn.

Once, when Mandy called Aaron, Nancy came on the phone. Mandy said she had been gathering information for Dunn. Nancy told Mandy that "if Mr. Dunn wants any more information, to call her and let her know about it but don't call Aaron." Another time, Nancy called Mandy and threatened to fight her if she did not stop calling Aaron.

October 22, 1993, was the day of the Homecoming Dance. Dunn asked Mandy where Nancy was. Mandy replied that Nancy would be meeting Aaron at the dance, Dunn said he had somebody watching Aaron. Mandy called Aaron; she told him to watch out because Dunn was around and would hurt him that night if he could.

Some time in October 1993, Nancy ran away from home. She went to Aaron's house. Her parents called Dunn, who told them she was

with Aaron

Nancy phoned Dunn. According to Nancy, she confronted him about calling Aaron,, about having Mandy call Aaron, and about sending people to Aaron's house.. At first, he denied doing these things, but eventually he admitted them He said, "Don't be angry, Nancy. I love you." She hung up on him. That was the last time she talked to him.

According to Dunn, Nancy was already angry with him because she had asked him to buy her a stereo and he had refused. In her phone call, she was angry about him telling her parents where she was, and she yelled obscenities at him.

Around this time, Nancy told a guidance counselor, "I'm mad at Mr. Dunn I'm going to get him into trouble."

*C. Dénouement*

On October 26, 1993, Nancy met with Karen Pina, her guidance counselor, and told her about Dunn's conduct toward her. Pina referred Nancy to Principal Young, Young immediately suspended Dunn.

Young admitted he did not like Dunn. After Dunn was suspended, Young remarked, "I have finally achieved my greatest contribution toward education. Mr. Dunn is. history." Three of the teachers who testified favorably to Dunn said they feared retaliation for their testimony.

Young had several meetings with Nancy's parents. Nancy's father indicated he knew Dunn and Nancy were spending time together. He also admitted Nancy had lied to her parents,

Nancy was frequently absent that semester.

At Nancy's request, Young met with her teachers. He told them to be sensitive to her needs, but not to "'cut her any slack."

Nancy had told Pina about Mandy's involvement. On November 4, 1993, Dunn called Mandy. According to Mandy, he told her Pina would be calling to get a declaration from her. He told her to say she did not know anything about Dunn's relationship with Nancy, that Nancy was a liar, and that Nancy was using drugs Dunn denied this.

On December 28, 1993, at a meeting with Pina and a paralegal, Mandy signed a declaration. At trial, she testified this declaration was truthful. When she showed the declaration to Dunn, he told her to "try to get around it and just deny a lot of the things." He said if she "stayed" with his side of the story," he would give her some of the money he expected to get by suing the District for wrongful termination. He had Mandy make extensive handwritten changes to the declaration, essentially retracting everything detrimental to him.

Dunn admitted telling Mandy to cross out any statements in her declaration that were misleading or untrue However, he denied offering her money.

Meanwhile, Mandy told Pina she was under a lot of stress and did not want to testify. She claimed she had lied about some things.

On February 21, 1994, Mandy wrote out and signed the following statement: I do not want to testify for Nancy [W.] because she is a liar. I am not afraid of Mr. Dunn." Dunn admitted he asked her to write it, because the District was accusing him of harassing and intimidating Mandy, At trial, however,

Mandy denied signing the statement,

Between March and May 1994, Mandy met with Dunn's attorney. She told this attorney what Dunn had told her to say - that Nancy was a liar and on drugs.

In June 1994, Mandy called Pina and said she wanted to make another statement. As a result she gave a videotaped statement, which was essentially consistent with her original declaration. When Dunn found out he told Mandy "[she] was really stupid for doing that and [she] shouldn't have done that." He added, "We've got to think of a way to fix this."

Dunn attended Mandy's deposition. At the deposition, she testified he never offered her any money. At trial, she admitted this was a lie, but explained, "it's different when I go home"; she was afraid she "was going to get phone calls from a bunch of people; why did this, why I said that The morning after the deposition, Dunn did call her, but she hung up on him.

In her declaration, Mandy said she was afraid of Dunn because "he could send people after me." At trial, she said she was not afraid of him; however, she was 'uneasy," because "some friends he knows, they're friends of mine And if they get upset with me, I don't know what could happen."

*D. Charges Found "Not Established."*

Nancy testified that: (1) Dunn made sexual comments to her, including, "You'd be good in bed; any guy would be stupid not to want you"; "You have a nice ass"; [Y]ou have really nice, soft lips and they looked really moist -and kissable the other night' '; and "Are you a virgin?" (2) Dunn frequently did

her homework for her. (3) Once, when Dunn returned from a trip, he said he missed her and thought of being with her while he was away. He also said he wanted to work on having a relationship with her after she graduated, (4) Dunn introduced her to a

repairman at his house as his "girlfriend."' In addition, both Nancy and Aaron testified that on occasion, Dunn either followed them or had them followed. The Commission found all these allegations "not established."'

Nancy also testified Dunn gave her free sodas at school, One day, he remarked, "We have to figure out how you are going to pay me for all this, [d]ear Nancy." The Commission found this did occur, but found further that Dunn gave other students free sodas, and made similar comments to other students, both male and female; it concluded "it was not proven the comment was intended to establish a sexual or romantic relationship...."

Nancy testified Dunn said, "You know what I need, I need a girlfriend The Commission found he did say , I a new girlfriend," but it also found he made similar comments to other students, both male and female, by which he merely meant he was upset with Heather; it concluded "the preponderance of the evidence did not establish that [Dunn's] comments were an effort on his part to initiate a romantic or sexual relationship with [Nancy]."

Nancy testified Dunn said, "You are not like any other student I have ever known," and "You need to learn to trust me because I care about you a lot." The Commission found

he did make similar remarks, but concluded they "were not proven to be an effort on his part to initiate a romantic or sexual relationship with [Nancy]."

The Commission concluded: "Nancy's allegations regarding [Dunn's] expressions of his desire to have a sexual or romantic relationship with her were not believed."

E. *Additional Defense Evidence*

A parade of defense witnesses testified Dunn was an outstanding teacher caring, involved, and supportive. He sponsored the Schools Without Drugs club and Stop Tagging Our Property, an anti-graffiti group.

Dunn had a special rapport with students. Students would hang out in his classroom during breaks and lunch. They came to him for advice on their personal problems. He helped many students, not just Nancy, with their homework.

Dunn had made loans of up to $4,000 to several students and former students. He had also let other students borrow a car or van once for as long as two months. He had gone shopping and out to dinner with other students.

## II

## PROCEDURAL BACKGROUND

On December 7, 1993, the District gave Dunn a notice of intent to dismiss, together with a statement of charges. (Ed. Code, §44934.) On December 15, 1993, Dunn demanded a hearing. (Ed. Code, §§44934, 44937, 44941, 44943.)

A Commission on Professional Competence was appointed, comprised of an Administrative Law Judge; the District's nominee, a vice-

principal (and former special education teacher) from another district; and Dunn's nominee, a special education teacher from another district. (Ed. Code, §44944.) The Commission held a hearing from March 7 through March 23, 1995. On April 21, 1995, it issued its decision. It found good cause for Dunn's dismissal for immoral conduct (Ed. Code, §44932, subd. (a)(1)), dishonesty (Ed. Code, §44932, subd. (a)(3)), and evident unfitness for service (Ed. Code, §44932, subd. (a)(5)). It also found Dunn's dismissal did not violate his First Amendment rights,

On May 19, 1995, Dunn filed a petition for writ of mandate. (Code Civ. Proc, §1094.5; Ed. Code, §44945; Gov. Code, §11523.) On May 31, 1996, the trial court held a hearing on the petition. On June 26, 1996, it issued a statement of decision, Although it applied its independent judgment it essentially adopted all of the Commission's findings and conclusions. It further found Dunn's due process rights had not been violated, in that the District's statement of charges had given him sufficient notice of the charges against him; and the Commission had not improperly excluded evidence. Accordingly, on July 9, 1996, it entered judgment denying the petition.

On August 6, 1996, Dunn filed notice of intention to move for new trial, and on August 16, 1996, he filed a motion for new trial. On September 11, 1996, after a hearing, the trial court orally denied the motion for new trial. On October 3, 1996, it issued a formal written order to this effect. On October 9, .1996, Dunn filed a timely notice of appeal.

## III

## THE SUFFICIENCY OF THE EVIDENCETO SUPPORT THE FINDINGS

Dunn contends the Commission's findings, which the trial court essentially adopted, are not supported by the evidence.

*A. Evidence Which May Be Considered "Substantial."*

Dunn contends Nancy, Mandy, and Aaron's testimony does not constitute substantial evidence. With respect to Nancy, he notes certain inconsistencies among her various statements; he particularly notes that she included certain matters in her previous statements to which she did not testify at the hearing, or vice versa. He also argues her testimony was inconsistent with the fact that she kept up her relationship with him. He argues she was motivated to lie. Finally, he argues she had a poor character for honesty.

The credibility of witnesses and the weight to be given to their testimony were matters for the Commission and the trial court to determine. "We may not discount [Nancy's] testimony 'unless it is physically impossible or inherently improbable and such inherent improbability plainly appears.' [Citation]" *(Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App. 4th 511, 518, quoting *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204.) Testimony that is inconsistent or conflicting is not for that reason inherently improbable. Such testimony can constitute substantial evidence. (Hasson v. Ford Motor Co. (1982) 32 Cal.3d 388, 403, cert. dism. (1983) 459 U.S. 1190 [103 S.Ct.

1167, 75 L.Ed.2d 422]; Clemmer v. Hartford Insurance Co. (1978) 22 Cal.3d 865, 878) All of these matters were before the Commission and evidently influenced it to reject many of Nancy's claims, Contrary to Dunn's contention, the Commission and the trial court could selectively believe some, though not all, of her testimony.

With respect to Mandy, Dunn argues she recanted her testimony, then recanted her recantation, Under the same principles, however, her testimony nevertheless constituted substantial evidence. With respect to Aaron, Dunn merely argues Aaron was a gang member1 and a drug user, and, as with Nancy, notes that he testified to two or three matters at the hearing which he had not mentioned before. Aaron's testimony nevertheless was substantial evidence.

*B. Evidence Supporting Particular Findings.*

Dunn lists particular findings which he contends are not supported by substantial

---

1 No evidence Aaron was a gang member was admitted at the hearing; the Commission excluded such evidence as irrelevant or, alternatively, as more prejudicial than probative.

Aaron did admit in his deposition that he was a former gang member. However, as hearsay, this would have been insufficient to support a finding that he actually was a gang member (a principle Dunn asserts vigorously when it applies to hearsay less favorable to him). (Gov. Code, §11513, subd. (c); see also Code Civ. Proc., §2025, subd. (u).)

evidence.2 The vast bulk of Dunn's contentions fall into four categories

First Dunn contends particular findings are supported solely by the testimony of Nancy, Mandy, and/or Aaron, and this testimony did not constitute substantial evidence. We have already rejected this contention.

Second, Dunn challenges certain conclusory words used in the findings as not supported. For example, the Commission found Dunn lived "on a remote cul de sac" Dunn contends there was no evidence it was "remote." Similarly, the Commission found Dunn "began spending a great deal of time alone with Nancy"; Dunn contends their shopping trips did not amount to "a great deal of time." In each such instance, we believe the Commission's choice of wording is supported either directly, by the evidence, or indirectly, by reasonable inferences from the evidence,

Third, Dunn contends there is evidence contrary to particular findings For example, the Commission found "most of the items [Dunn] purchased for Nancy were intended to be gifts." Dunn admits there is evidence supporting this finding (including Nancy's testimony to this effect), but he argues they were really loans (citing such evidence as

---

2 We deem Dunn's contention waived with respect to findings he did not challenge in his opening brief, but challenged only belatedly in his reply brief (Gentry v. City of Murrieta (1995) 36 Cal.App.4th 1359, 1398.) Indeed, Dunn explicitly conceded in his opening brief that any findings not challenged therein were supported by at least some testimony by Nancy, Aaron, and/or Mandy that was "in the ballpark."

Nancy's testimony that she kept the receipts in case Dunn demanded repayment.) Similarly, the Commission found Mandy "called Aaron numerous times at [Dunn's] request." Dunn admits there is evidence supporting this finding (including Mandy and Nancy's testimony to this effect), but he argues Mandy really called Aaron at Nancy's request (citing such evidence as that Nancy knew Mandy and had her telephone number.) In each such instance, we decline this invitation to reweigh the evidence.

Fourth, in a few instances, Dunn correctly identifies portions of the findings that are not supported by substantial evidence. For example, the Commission found "Nancy drove her car to [Dunn's] home at least ten times." Although there is evidence Nancy visited Dunn's house frequently indeed, more or less at will we find no evidence to support the specific figure of ten visits.3 Similarly, the Commission found "[Dunn] asked Sciortino to obtain information maintained by law enforcement and other governmental agencies to assist in determining if [Nancy] might be in any trouble." The evidence showed Dunn asked Sciortino to run a DMV or criminal records check, but Sciortino did not remember on whom. We find no evidence Dunn asked him to run these checks on Nancy.

The Commission found that on October 2, 1993, Dunn called Aaron and said, "'Aaron, you are in big trouble You should not have told her [Nancy] all the things you -told

---

3 The District's original charges alleged, "you invited Nancy [W.] to drive to your home on at least ten occasions." This appears to be the source of the Commission's figure.

her. I asked you not to call her anymore.' [1] In the course of their conversation ....[Dunn] implied he would harm Aaron's family if Aaron continued to associate with Nancy." Although there was evidence Dunn said, "Aaron, you are in big trouble should not have told her all the things you told her," there was no evidence he said, I told you not to call her anymore." There also was no evidence he threatened Aaron's family during this phone call (although he had threatened Aaron's family in a phone call on the previous night).4

In each of these instances, Dunn cannot show the unsupported portion of the finding was prejudicial. That is, we believe there is no reasonable probability that absent the unsupported portion, the outcome would have been more favorable to him. (See Cal, Const., art. VI, §13; Code Civ. Proc., §1094.5, subd. (b))

We will address in detail only Dunn's few contentions which do not fall into any of the foregoing categories,

(1) The Commission found Dunn "began spending a great deal of time with Nancy without her parents' knowledge." Nancy testified her parents did not know anything about her trips with Dunn; Dunn contends, however, this was hearsay insufficient to support a finding. (See Gov. Code, ' 115 13, subd. (d) ) Nancy also testified, however, she did not tell her parents about these trips because they would have been unhappy. The inference that her parents did not know

---

4 Once again, the Commission appears to have derived these portions of its finding from the District's original charges.

is reasonable and is not hearsay. Moreover, Dunn himself admitted he did not discuss these trips with Nancy's parents, because "they never asked." While there was evidence Nancy's parents knew Dunn called her on the phone from time to time, this was not evidence they were fully aware of how much time Dunn and Nancy spent together.

(2) The Commission found "[Dunn] asked Mandy to telephone Nancy, under an assumed name,, to find out if Nancy was at home and what her plans were." Dunn admits both Young and Pina testified Nancy told them this, but he contends this was hearsay insufficient to support a finding. Mandy, however, signed a declaration stating, "[Dunn] asked me to call a girl named 'Nancy' and find out if she was home on a few occasions." At the hearing, Mandy testified her declaration (with one irrelevant exception) was accurate. Mandy also testified, "[Dunn] asked me once to call Nancy [W.]'s home just to see if she was home, and if she got on the phone, to hang up."

Dunn argues Nancy would have recognized Mandy's voice. Nancy did testify that when she spoke to Mandy on the phone, she recognized Mandy's voice. However, Nancy would not have recognized Mandy's voice if, as Mandy testified, she made a "hang-up" call to see if Nancy was home. In any event the Commission merely found Dunn asked Mandy to call Nancy; it did not find Mandy actually did so.

Admittedly, there was no nonhearsay evidence that Dunn asked Mandy to use an assumed name when she called Nancy, or to, find out what Nancy's plans were. Assuming, without deciding, these portions of the

Commission's finding rest entirely upon hearsay (and farther assuming they do not use hearsay appropriately "for the purpose of supplementing or explaining other evidence" (Gov. Code, §11513, subd. (d)), we do not believe Dunn can show these isolated portions of the finding were so prejudicial as to call for reversal.

(3) The Commission found: "On October 22, the day of Jurupa Valley High's Homecoming Dance, [Dunn] telephoned Mandy and told her Nancy's plans f or the evening. [Dunn] told Mandy there would be surveillance at Raincross Square, where Nancy planned to go with Aaron in connection with the Homecoming Dance. [1] Mandy became concerned and called Nancy. Nancy was very upset that [Dunn] was continuing to bother her."

Mandy testified: I talked to Mr. Dunn about the Homecoming Dance. He told me about it coming up, that Nancy and Aaron were going together, and that he was thinking about chaperoning it." Around the time of the dance: I was told by Dunn that he had somebody watching [Aaron] to see where he goes. . . " Mandy did become concerned; however, she called Aaron, not Nancy. She told Aaron "to watch out because Mr. Dunn was around and he would hurt [Aaron] that night if he could." Aaron then relayed to Nancy what Mandy had said. There was no evidence this phone call in particular upset Nancy. However, there was ample evidence that during this time period, Nancy was becoming increasingly upset about Dunn bothering her.

This represents probably the single greatest discrepancy between the findings and the evidence. Nevertheless, the evidence showed Dunn did discuss Nancy's plans with

Mandy; Dunn did tell Mandy he had Aaron under surveillance; Nancy did learn of this; and Nancy did become upset. Thus, yet again, we cannot believe this isolated discrepancy prejudiced Dunn in any way.

IV

THE SUFFICIENCY OF THE FINDINGS TO SUPPORT THE DECISION

Dunn contends the findings do not support his dismissal based on immoral conduct dishonesty, or evident unfitness for service.

"Immoral conduct," "dishonesty," and "evident unfitness for service" are not grounds for dismissal unless they demonstrate unfitness to teach. (Fontana Unified School Dist. v. Burman (1988) 45 Cal.3d 208, 221, fn. 12 [dishonesty]; Board of Education v. Jack M. (1977) 19 Cal. 3 d 691, 696-697 and 697, fn. 2 [immoral conduct]; Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 225 [immoral conduct]; Woodland Joint Unified School Dist. v. Commission on Professional Competence (1992) Cal. App. 4th 1429, 1445 [evident unfitness for service]; Bassett Unified School Dist. v. Commission on Professional Competence (1988) 201 Cal.App.3d 1444, 1454 [dishonesty].)

In determining whether a teacher's misconduct demonstrates unfitness to teach, it Should be measured against seven criteria ...: (1) the likelihood that the conduct would incur; (2) the existence of aggravating or extenuating circumstances; (3) the impact of publicity; (4) the effect on teacher-student relationships; (5) any disruption of the educational process; (6) the employee's motive for the conduct; and (7) the proximity or remoteness in time of the conduct."

(Fontana Unified School Dist. v. Burman, supra, 45 Cal.3d at p.220; see also Board of Education v. Jack M, supra, 19 Cal.3d at p.701, fn.5; Morrison v. State Board of Education, supra, 1 Cal.3d at p.229) These are sometimes called the "Morrison factors," after their genesis in Morrison v. State Board of Education, supra, 1 Cal.3d 214.

In addition, "evident unfitness for service" is not grounds for dismissal unless it indicates a temperamental defect or inadequacy - "a fixed character trait." (Woodland Joint Unified School Dist. v. Commission on Professional Competence, supra, 2 Cal.App.4th at p.1444.) This is so because a teacher who is dismissed for "unprofessional conduct" is entitled to 45 days' notice; a teacher who is dismissed for "evident unfitness for service" is not. (Id., at p. 1445; see Ed. Code, §44932, subd. (a).) "The purpose of the notice requirement is to allow a teacher to correct his or her conduct and thus overcome grounds for the charge. [Citations.]" (Woodland Joint Unified School Dist. v. Commission on Professional Competence, supra at p. 1444.) Because "evident unfitness for service," unlike "unprofessional conduct," involves a fixed character trait, there is no need to give a teacher accused of evident unfitness for service either notice or an opportunity to correct the misconduct. (Id., at pp. 1444-1445.)

Dunn appears to assume (although he does not explicitly argue) that "immoral conduct" and "dishonesty" likewise are not grounds for dismissal unless they stem from a fixed character trait. This is incorrect. "Immoral conduct" and "dishonesty require unfitness to

teach; in "evident unfitness for service," the word "evident" imports the additional requirement that the unfitness, stem from a temperamental defect. (Woodland Joint Unified School Dist. v. Commission on Professional Competence, supra, 2 Cal.App.4th at pp. 1444-1445.) We have found no authority requiring that "immoral conduct" or "dishonesty" be caused by a temperamental defect.

The teacher's fitness or unfitness is a question of ultimate fact. (Board of Education v. Jack M, supra, 19 Cal.3d at p. 698, fn. 3; Governing Board v. Haar (1994) 28 Cal.App.4th 369, 384; West Valley-Mission Community College Dist. v. Conception (1993) 16 Cal.App.4th 1766, 1775.) Accordingly, we review the trial court's finding of unfitness under the deferential substantial evidence test. (Governing Board v. Haar, supra, at pp. 384-385; West Valley-Mission Community College Dist. v. Concepcion, Supra, at p. 1776.)

*A. Immoral Conduct*

The Commission concluded good cause existed to dismiss Dunn for immoral conduct based on: (1) his purchases for Nancy, which the Commission found were gifts, and not loans; (2) his efforts to conceal his activities with Nancy from her parents and 3thers; (3) his attempt to have Nancy added to his car insurance; (4) Sciortino's testimony; (5) Mandy's phone calls to Aaron; (6) Dunn's threats to Aaron; and (7) his instructions to Mandy to say Nancy was a liar and on drugs.

Dunn argues his conduct was less egregious than that found sufficient to warrant dismissal in other cases. (E.g., Governing Board v. Haar, supra, 28 Cal.App.4th at p.

378-383 [middle school teacher hugged, caressed, and made sexual comments to students]; Gardner v. Commission on Professional Competence (1985) 164 Cal.App.3d 1035, 1037-1038 [high school teacher flirted with students, asked them out on dates, made sexual comments to them, and used marijuana in their presence].) The fact that worse misconduct has been found sufficient in other cases, however, does not mean Dunn's misconduct was insufficient.

Similarly, Dunn relies on Board of Education v. Commission on Professional Competence (1980) 102 Cal.App.3d 555. There, during a teachers' strike, an intermediate school teacher called in a false bomb threat. A commission on professional competence found the teacher fit to teach, and thus declined to dismiss him. The school district filed a petition for Writ of Mandate, but the trial court, applying an independent standard of review, likewise found the teacher fit to teach. (Id., at p. 559.) The appellate court held the trial court's determination that the teacher was fit to teach was supported by substantial evidence. (Id., at pp. 560-562.) It concluded: "We do not hold that those who disrupt the educational process by the making of a false bomb threat to one's school must be permitted to teach in the California public schools. Only that reluctantly, under applicable appellate review standards and higher decisional authority, we are compelled to affirm the trial court's resolution of conflicting testimony on the issue of fitness (Id., at p. 562.) Here, where both the Commission and the trial court found Dunn was not fit to teach, Board of Education does not require us to find he was fit; to the

contrary, it counsels us to defer to their finding of unfitness.

Dunn also relies on Blake v. State Personnel Board (1972) 25 Cal.App.3d 541. There, a state civil service employee, while attending a convention, pointed a gun at two male employees and told one of them to stay away from a certain female employee. (Id., at pp. 546-547.) This resulted in his dismissal for "[d]iscourteous treatment of . . . other employees" (Gov. Code, §19572, subd. (m)). (Blake v. State Personnel Bd., supra, at pp. 547-548.) On appeal, this court (Gardner, J., dissenting) held dismissal was too harsh a penalty in light of the facts that: the employee had worked for the state for over 20 years and had an "exemplary" record; there was no direct evidence that the male employees' work would be affected; the incident occurred off-duty, after the group had been drinking; the next morning, the employee called the male employees and apologized; and he later sold his gun and ended his relationship with the female employee. (Id., at pp. 553-554.)

What distinguishes this case is the likelihood of recurrence. Unlike Blake, Dunn had a record of prior discipline. Also unlike Blake, Dunn did not end his misconduct voluntarily; Nancy had to tam him in. He tried to interfere with the proceedings by inducing Mandy to lie and by lying himself Dunn showed no remorse; to the contrary, he maintained, and continues to maintain, there was nothing improper about his conduct. On these facts, we cannot say dismissal was too harsh a penalty.

Under the Morrison factors, this likelihood of recurrence is a crucial indicator that

Dunn's misconduct indicates unfitness to be a teacher. The motive for the misconduct is another crucial indicator. Here, the Commission found the reason for Dunn's interest in Nancy, although "not well understood," was neither sexual nor romantic. It likened him to Henry Higgins, and Nancy to Eliza Doolittle. Dunn argues he was motivated by a genuine concern for Nancy. Dunn, however; also had a genuine concern for other students. If the way he manifests his concern for students is by making extravagant gifts (or even undocumented loans) to them, taking them on trips without their parents' knowledge, adding them to his car insurance, checking up on the activities of their friends, and, should he determine a friend is unsuitable, threatening the friend, this motive still indicates unfitness to be a teacher.

Finally, Dunn's misconduct was not remote in time. Although, as far as we know, Dunn's misconduct did not receive widespread publicity and did not disrupt the educational process, we believe the Commission could reasonably find it did indicate unfitness to be a teacher.

*B. Dishonesty.*

The Commission concluded good cause existed to dismiss Dunn for dishonesty based on his efforts to conceal his activities with Nancy from her parents and others and his instructions to Mandy to say Nancy was a liar and on drugs. It found his "dishonesty and disposition to deceive is also demonstrated" by: (1) his disclosure of confidential memos; (2) his efforts to recharacterize his gifts to Nancy as loans; (3) his attempt to have Nancy added to his car insurance; (4) his

having Mandy call Aaron under an assumed name; (5) Sciortino's testimony; (6) Dunn's efforts to induce Mandy to lie; and (7) his lack of candor and cooperation during the proceedings.

Applying the Morrison factors, we believe the trial court could reasonably find these instances of dishonesty demonstrated that Dunn was unfit to teach. Once again, probably the single most important factor here was the likelihood of recurrence. We are not dealing with a single fib. Dunn was consistently willing to deceive others to achieve his own ends. When he learned he was under investigation, his reaction was to induce Mandy to he for him. As the Commission essentially found, he even lied under oath in these proceedings. Thus, even though, as discussed above, Dunn could have been dismissed for dishonesty which was not a fixed character trait here there was ample evidence his dishonesty was a fixed character trait which he could not alter no matter how much notice he was given.

In addition, there were aggravating circumstances, in that Dunn's dishonesty was a tool to cover up his other misconduct. His motives were entirely self-interested. While it may be true his immoral conduct was motivated by a sincere desire to help Nancy (see part IV.A, ante), his dishonesty was not. And his dishonesty was not remote in time; rather, it continued during the hearing.

Admittedly, there was no evidence that Dunn's dishonesty came to the attention of the student body or disrupted the educational process. Nevertheless, we believe it adequately demonstrated unfitness to teach.

(See Blain v. Doctor's Co. (1990) 222 Cal.App.3d 1048, 1064 [doctor's perjury at deposition in medical malpractice action against another doctor was substantially related to duties of physician so as to be grounds for discipline under Bus. & Prof. Code, §2234, subd. (e)]; Warren v. State Personnel Bd. (1979) 94 Cal.App.3d 95, 107-108 [law officer's false statements to superiors regarding his attendance at commercial sex party harmed public service so as to be grounds for discipline under Gov. Code, §19572, subd. (f)].)

As we will note in part VIII, post, Dunn's First Amendment challenge to his dismissal is aimed exclusively at the ground of "evident unfitness for service"; it fails to impact the grounds of "immoral conduct" and "dishonesty." Since the findings amply support his dismissal on either of these two grounds, we need not consider whether they also support dismissal on the third.

V

DUE PROCESS NOTICE

Dunn contends he did not have sufficient notice his conduct was prohibited, in Violation of due process. The District does not respond to this contention.

The "void for vagueness" doctrine applies in both civil and criminal actions. In a civil action, however, it applies only where "'the exaction of obedience to a rule or standard [is] so vague and indefinite as really to be no rule or standard at all. . . .' In short the exaction must strip a participant of his rights to come within the principle of the cases.'' (Boutilier v. Immigration Service (1967) 387 U.S. 118, 123

[87 S.Ct. 1563, 18 L.Ed.2d 661].) This distinction between civil and criminal actions accords with common sense; otherwise, it could be argued ordinary negligence or breach of contract liability violates due process.

Statutorily, the conduct which may result in a teacher's dismissal includes immoral conduct (Ed. Code, §44932, subd. (a)(1)), dishonesty (Ed. Code, §44932, subd. (a)(3)), and evident unfitness for service (Ed. Code, §44932, subd. (a)(5)). Although "immoral conduct," standing alone, might be unconstitutionally vague, it has been judicially construed as limited to immoral conduct which indicates unfitness to teach. "Dishonesty" has been similarly limited to dishonesty which indicates unfitness to teach. As so construed, the statute is not unconstitutionally vague. (Fontana Unified School Dist. v. Burman, supra, 45 Cal.3d at p. 220, fn. 12; Morrison v. State Board of Education supra, 1 Cal.3d at pp. 230-235.)

Dunn essentially argues he had no way of knowing that going shopping with Nancy, eating out with her, and making loans and/or gifts to her could result in his dismissal, particularly in light of the evidence that he engaged in similar conduct with other male and female students. We disagree, for two reasons.

First this conduct cannot be viewed in isolation. Dunn also took steps to keep his relationship with Nancy a secret; he did not make her parents aware of the true extent of his involvement with her. He gave Nancy the keys to his house and to his car. He tried to have her added to his car insurance, which required that she be living with him. He

indicated to his insurance agent that she was living at his address. He had Mandy call Aaron, using an assumed name, and try to flirt with him. Next, he asked Mandy to find out where Aaron lived, what he did during the day, and what kind of car he drove. Finally, he had Mandy call Aaron and tell him two men with guns were watching him. Dunn admittedly threatened Aaron and his family.

The Commission - made up of one experienced teacher selected by Dunn, another selected by the District, and a neutral administrative law judge - unanimously determined this added up to immoral conduct indicating unfitness to be a teacher. We believe a reasonable teacher who engaged in. such conduct would know he or she was stepping over the line. Dunn's efforts to re-characterize his gifts to Nancy as a loan and to induce Mandy to lie prove he was subjectively aware that his conduct was improper. We cannot say the Commission's determination was standardless, nor that it stripped Dunn of his rights.

Second, the Commission found good cause to dismiss Dunn, not only for immoral conduct but also for dishonesty. Dunn does not claim he had no way of knowing his conduct was dishonest or no way of knowing this dishonest conduct constituted grounds for dismissal. We could uphold his dismissal on this basis alone.

We conclude Dunn had fair notice his conduct could result in his dismissal.

VI

FINDINGS OF UNCHARGED MISCONDUCT

Dunn contends the Commission improperly relied on uncharged misconduct by finding (1) he spent a great deal of time alone with

Nancy without her parents' knowledge; (2) he tried to have Nancy added to his car insurance; (3) he had Sciortino take him by Aaron's house, and then by the library; (4) he asked Mandy to call Aaron and tell him two men were watching his house; and (5) he tried to influence the testimony of Mandy and other witnesses, and he lacked candor at the hearing.

Dunn was entitled to notice of the charges against him, as a matter of both statute (Ed. Code, §44934; Gov. Code, §11503) and due process. *(Smith v. State Bd of Pharmacy* (1995) 37 Cal.App.4th 229, 241-245.) However, in an administrative proceeding, as in an ordinary civil action, a " variance between pleadings and proof is not a basis for reversal unless it prejudicially misleads a party. A variance must be disregarded if the issues on which the decision is actually based were fully and fairly tried. [Citations.]" *(Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143-144; accord *Stearns v. Fair Employment Practice Com.* (1971) 6 Cal.3d 205, 212214.) Moreover, failure to object when the evidence relevant to an issue is introduced waives any claim that the issue is outside the pleadings. *(Colbert v. Colbert* (1946) 28 Cal.2d276, *281; Frank Pisano & Associates v. Taggart* (1972) 29 Cal.App.3d 1, 16.)

With respect to the finding that he spent a great deal of time alone with Nancy without her parents' knowledge, Dunn argues he was prejudiced because he could have subpoenaed Nancy's parents or brother. The District did specifically allege, however, that her parents were unaware of their dinners together. It also alleged that, at Dunn's

request Nancy concealed her car when she visited his house. Thus, we believe the District sufficiently raised this issue. Alternatively, we believe Dunn cannot claim prejudice; based on these allegations, he knew Nancy's parents and brother were significant witnesses; he nevertheless chose not to call them. Finally, Dunn waived his present contention by failing to object when the evidence supporting this finding was introduced.

With respect to the finding that he tried to have Nancy added to his car insurance, Dunn argues he was prejudiced because this issue came up on the last day of the hearing, on rebuttal, so that he was unable to gather contrary evidence. The District, however, specifically charged: "You gave a set of your car keys along with a car alarm to Nancy *[W.] and also added her to your automobile insurance* (Italics added.) Thus, this misconduct was clearly within the charges.

Dunn also argues he was prejudiced because the District merely alleged the fact that he added Nancy to his car insurance as an instance of immoral conduct and/or evident unfitness for service; he claims the Commission relied on the *manner in* which he added Nancy to his car insurance as an instance of dishonesty. This does not correctly reflect the Commission's findings. First the Commission noted that "[Dunn] specifically denied directing that Nancy be added to his policy." Then, it reviewed the extensive evidence demonstrating that he had, in fact added Nancy to his policy. It concluded, "[Dunn] willfully misrepresented what actually occurred."

The district could hardly have charged Dunn

with dishonesty at (or in connection with) the subsequent administrative hearing. We may assume, without deciding, that the Commission could not have dismissed Dunn based solely on his dishonesty at the administrative hearing, because it was uncharged. However, the Commission could properly consider his dishonesty at the hearing as evidence supporting an *overall* finding of dishonesty. (See *People v. Fitch* (1997) 55 Cal.App4th 172, 179 ["'In the determination of probabilities of guilt evidence of character is relevant."'], quoting *People v. Jones* (1954) 42 Cal.2d 219, 223; see also Gov. Code, §11513, subd. (c) [relevant evidence is admissible in administrative proceeding "if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs ...."].)

The Commission also could properly consider his dishonesty at the hearing as evidence that the charged instances of dishonesty indicated unfitness to teach. (See *Fontana Unified School Dist v. Burman, supra,* 45 Cal.3d at pp. 220 and 220, fn. 12 [dishonesty justifies discipline only if it indicates unfitness to teach].) Given "the factors to be considered in evaluating fitness[,] ... the hearing could not be limited to the single question whether the teacher committed the charged act." *(Board of Education v. Jack* M, supra, 19 Cal. 3d at p. 70 1.)

Here, the Commission found good cause to dismiss Dunn for dishonesty, "based on" three specified findings. These did not include the challenged finding. Then, after discussing these findings in detail, it further found: "[Dunn's] dishonesty and disposition to deceive is also demonstrated" by eight other

specified findings. These did include the challenged finding. Thus, it used the challenged finding properly.

Finally, with respect to the finding that he had Sciortino take him by Aaron's house, Dunn argues he was prejudiced because he "could have sought evidence that other faculty have checked on students who may be getting into trouble outside of school," which would have supported his First Amendment defense. Dunn, however, did not object to the evidence supporting this finding. Moreover, as we hold in part VIII, post, the Commission implicitly found Dunn's dismissal was warranted even when his assertedly constitutionally protected activities were not considered. Accordingly, we perceive no prejudice.

With respect to the other challenged findings, Dunn does not claim prejudice at all, and we perceive none. We conclude the Commission did not improperly rely on any uncharged misconduct.

## VII

## ERRONEOUS EXCLUSION OF EVIDENCE

Dunn contends the Commission erroneously excluded certain evidence. The District does not respond to this contention.

First Dunn contends the Commission erred by precluding Young from stating whether he was aware of any instances in which Dunn had lied~ other than by denying

Nancy's allegations. The Commission ruled this was irrelevant to the charged instances of dishonesty.

Second, Dunn contends the Commission erred by excluding evidence Aaron had a felony

conviction for possession of methamphetamine. The Commission ruled the conviction was irrelevant to show dishonesty because it did not involve moral turpitude (see generally *People v. Castro* (1985) 38 Cal.3d 301, 306, 313-317; *Robbins v. Wong* (1994) 27 Cal.App.4th 261, 274); alternatively, if relevant it was more prejudicial than probative (Evid. Code, §352).

Third, Dunn contends the Commission erred by excluding the testimony of Nathan Basilio Hernandez that Alan (Nancy's brother) had said that Nancy had said: (1) she was going to get back at Dunn for telling her parents where she was when she ran away, and (2) Dunn was watching her at school. The Commission excluded this as "second or third generation hearsay."

The improper exclusion of evidence in an administrative proceeding may constitute a prejudicial abuse of discretion. *(King v. Board of Medical Examiners* (1944) 65 Cal.App.2d 644, 649; Cal. Administrative Mandamus (Cont.Ed.Bar 1989) §4.66 at p. 138.) We find no such abuse of discretion, for four reasons. First aside from Aaron's felony conviction, it appears Dunn waived these evidentiary contentions by failing to raise them timely in the trial court. *(In re Marriage of Freeman* (1996) 45 Cal.App.4th 1437, 1450-1451.) Second, Dunn offers no reasoned argument as to how or why the Commission erred. *(Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.) Third, the Commission's stated reasons for excluding the evidence appear sound. Fourth and finally, it does not appear the excluded evidence would have changed the result.

VIII

DISMISSAL BASED ON DUNN'S EXERCISE OF HIS FIRST AMENDMENT RIGHTS

Dunn contends he was dismissed in retaliation for the exercise of his First Amendment rights.

In addition to the other charges, the District charged Dunn with (1) sending a memo dated April 28, 1993, to Young which included specified personal and offensive comments, and (2) revealing the contents of confidential memos to (a) a reporter for the *Press-Enterprise*, and (b) a fellow teacher.

The Commission found these charges true. It further found neither Dunn's April 28, 1993, memo nor his distribution of the contents of the confidential memos related to a matter of public concern, and therefore neither implicated the First Amendment. The trial court exercising its independent judgment adopted these findings.

Dunn contends his April 28, 1993, memo to Young, and his distribution of confidential memos, constituted protected speech.5 We may assume, without deciding, he is correct But even assuming constitutionally protected conduct was a substantial factor in the District's decision to dismiss Dunn, the

---

5 In Dunn's reply brief, he continues to rely on these two instances of assertedly protected speech. At one point however, he argues we should also consider his successful efforts in 1989 to unseat three school board members. We reject this belated attempt to raise new issues in a reply brief. *(Gentry v. City of Murrieta, supra,* 36 Cal.App.4th at p.1398.)

dismissal may stand if the District can show it would have reached the same decision even in the absence of the protected conduct. (*Mi. Healthy City Board of Ed. v. Doyle* (1977) 429 U.S. 274, 287 [97 S.Ct. 568, 50 L.Ed.2d 471]; Williams v. City *of Los Angeles* (1988) 47 Cal.3d 195, 206.)

Young did not have unilateral power to dismiss Dunn. He could only file charges against Dunn with the school board. It was up to the school board to give notice of intent to dismiss. (Ed. Code, §44934.) Then, Dunn was entitled, upon request to a hearing before the Commission. (Ed. Code, §§44943, 44944.) The Commission was made up of one administrative law judge and two experienced teachers not employed by the District one selected by the District and one selected by Dunn. (Ed. Code, §44944, subd. (b).) The Commission made the final decision to dismiss (or not to dismiss) Dunn. (Ed. Code, §44944, subd. (c).)

"[W]hen a. teacher demands a hearing relative to his impending dismissal ... and seeks at that administrative hearing to present evidence tending to show that he was dismissed not for reasons stated in the accusation but for the exercise of constitutional rights, that evidence must be received substantively and findings must be made concerning it. If it is found by the board that the reason for dismissal was not the causes stated in the accusation but rather was official dissatisfaction with the teacher's exercise of constitutional rights, the board should order reinstatement unless it further determines that the consequent limitation on these rights is justified by a compelling public interest. If the board

finds that the reason for dismissal was the causes stated in the accusation and was not official dissatisfaction with the teacher's exercise of constitutional rights, it should enter a finding to that effect. If the board finds that the reason for dismissal was both the causes stated in the accusation and official dissatisfaction with the teacher's exercise of constitutional rights, it should make a finding to that effect and further should determine whether, absent the exercise of constitutional rights, it would dismiss the teacher." *(Bekiaris v. Board of Education* (1972) 6 Cal.3d 575, 592-593.)

"Just as we decline to permit school authorities to mask an unconstitutional dismissal behind a statement of valid causes, so we cannot allow a teacher genuinely dismissed for valid causes to be reinstated because school authorities were also displeased with his exercise of constitutional rights. If it were otherwise a teacher about to be dismissed for valid causes could insulate himself from dismissal simply by engaging in political activities offensive to his superiors." *(Bekiaris v. Board of Education, supra,* 6 Cal.3d at p. 593, fn. 12.)

Here, the Commission found good cause existed for Dunn's dismissal on each of three statutory grounds, immoral conduct dishonesty, and evident unfitness for service. The first two grounds, immoral conduct and dishonesty, were based exclusively on conduct relating to Nancy. Only the third ground, evident unfitness for service, was based, even in part on the

assertedly protected conduct.6 Thus, even though the Commission found no protected conduct was involved, it also implicitly found Dunn should be dismissed even absent the assertedly protected conduct.

We conclude that even assuming Dunn's memo to Young and his distribution of confidential memos constituted protected speech, his dismissal must stand.

IX

THE TRIAL COURT'S EXCLUSION OF DUNN'S PROFFERED "ADDITIONAL EVIDENCE"

Dunn contends the trial court erroneously excluded his proffered "additional evidence." The District does not respond to this contention.

Dunn asked the trial court to consider at least 25 separate items of evidence that were not in the administrative record. Most of these items related to the District's handling of sexual misconduct allegations against other teachers.

The District objected that the additional evidence was irrelevant and also that Dunn had failed to show the evidence could not in the exercise of reasonable diligence, have been produced at the administrative hearing. The trial court declined to consider the additional evidence on the grounds that: (1) it was hearsay, (2) it was outside the administrative record, and (3) it was irrelevant.

Under Code of Civil Procedure section 1094.5, subdivision (e): "Where the court

---

6 As we note in part IY, *post*, Dunn had not even raised the First Amendment as a defense to the charges involving Nancy.

finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the [administrative] hearing," and where "the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ. . . ." Thus, if evidence meets these requirements, the trial court may consider it even though it is outside the administrative record.

In an administrative proceeding, any relevant evidence is admissible, "if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs . . . . ." (Gov. Code, §11513, subd. (c).) Hearsay is admissible "for the purpose of supplementing or explaining other evidence it is not "sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Gov. Code, §11513, subd. (d).) Accordingly, under Code of Civil Procedure section 1094.5, subdivision (e), the trial court may consider otherwise inadmissible hearsay, provided it would have been admissible in the administrative proceeding. *(Windigo Mills v. Unemployment Ins. Appeals Bd* (1979) 92 Cal.App.3d 586, 597-598.)

Dunn argues the evidence of how the District had handled sexual misconduct allegations against other teachers was relevant to show that due to its animus against his First Amendment activities, the District reacted more harshly to Nancy's allegations that it otherwise would have. As Dunn himself had framed the issues, however, this was not relevant. Dunn had raised the

First Amendment as a defense solely to the charges involving Young and Tieri. He did not assert it as a defense to the charges involving Nancy. Accordingly, in its Prehearing Conference Order (see Gov. Code, §11511.5), the Commission stated: "[Dunn] assert[s] a special defense based upon the First Amendment of the United States Constitution related to all allegations *not pertaining to his alleged conduct with Nancy* [W.]" (Italics added.) Although Dunn could introduce new evidence in the trial court, it was too late to raise new issues. The trial court correctly ruled this evidence was irrelevant.

The trial court also correctly excluded this, and most of Dunn's other "additional evidence," as hearsay. Under *Windigo Mills*, it should have applied the evidentiary rules applicable to an administrative hearing; and, under those rules, hearsay not within an exception to the hearsay rule was nevertheless potentially admissible. The trial court's ruling that it was required to exclude any and all hearsay was somewhat overbroad.

Under those same rules, however, otherwise inadmissible hearsay, standing alone, is insufficient to support a finding. Dunn's proffered hearsay was therefore irrelevant unless Dunn also offered to support or corroborate it with admissible evidence. We have, carefully reviewed each item of additional evidence. The vast bulk of these items -predominantly newspaper articles and letters - were hearsay that would have been inadmissible in an ordinary civil action.

(Evid. Code, §1200.)7 Dunn did not offer any admissible hearsay or nonhearsay evidence to corroborate these items.8 Absent corroboration, they were irrelevant. Accordingly, the trial court properly excluded them.

Two of the items Dunn offered were declarations by potential witnesses. At an administrative hearing, a declaration is both admissible and sufficient to support a finding, provided the opposing party does not ask to cross-examine the declarant. (Gov. Code, §11514.) Thus, *Windigo Mills* held a declaration is equally admissible in an administrative mandate proceeding, "provided

---

7 A few of the items might have been brought within either the authorized admission exception (Evid. Code, §1222) or the business records exception (Evid. Code, §1271). Dunn, however, did not seek their admission' under these exceptions and did not attempt to lay the necessary foundation. To the contrary, he specifically argued the items of additional evidence were "administrative hearsay," i.e., hearsay inadmissible in an ordinary civil action.

8 We note one exception. Items S and T - letters from parents and students who supported Dunn - were corroborated by similar testimony at the administrative hearing. Indeed, Dunn told the trial court he was submitting them merely "to give the court a sense of a much larger volume of testimony at the [administrative] hearing of what a great teacher and member of the community Mr. Dunn is." These two items were, at best, cumulative. Dunn could not have been prejudiced by their exclusion.

the opposing party's right to cross-examine is fully protected." *(Windigo Mills v. Unemployment Ins. Appeals Bd, supra,* 92 Cal.App.3d at p. 598.)

Here, the trial court had already ordered that there would be no live testimony at the hearing. There is no indication Dunn objected to this; in this appeal, he does not contend the trial court erred. As a result of this ruling, however, the District lost the ability to cross-examine any of Dunn's declarants. From that point on, we believe Dunn concomitantly lost the ability to introduce new declarations.

Finally, Dunn offered item M (Nathan Basilio Hernandez's notes indicting Alan told him Nancy had said she was going to get back at Dunn) and item Q (an excerpt from Young's deposition in which he stated he could not remember another instance in which Dunn lied) on the theory that the Commission had improperly excluded them. For the reasons stated in part *VII, ante,* we do not believe the Commission erred by excluding these items. Hence the trial court, likewise, did not err by excluding them. If the trial court did err,, we do not believe any such error was prejudicial.

X

DUNN'S MOTION FOR NEW TRIAL BASED ON MANDY'S RECANTATION OF HER TESTIMONY

Dunn contends the trial court erred by denying his motion for a new trial, which. was based on newly discovered evidence that Mandy had recanted her testimony. The District does not respond to this contention.

*A. Factual Background.*

In support of Dunn's motion for new trial,

Mandy submitted a new declaration recanting the key points of her testimony. She stated her original declaration had been false, and her handwritten changes to it essentially recanting it, had been true.

Mandy also stated: Karen Pina had promised her $1,200 in exchange for her testimony against Dunn. Pina had made this promise in the presence of the District's attorney, and in his office. Pina gave Mandy a written agreement to this effect although Mandy later misplaced it. Pina did pay Mandy about $370 pursuant to the agreement. However, after she learned Mandy had misplaced the written agreement she failed to pay the rest.

Dunn submitted his own declaration to the effect that on June 27, 1996 (one day after the trial court issued its statement of decision), Mandy had telephoned him "out of the blue," and had disclosed for the first time that Pina had paid her.

In opposition to the motion, the District submitted Pina's declaration stating: "I emphatically deny that I engaged in any activity regarding the offering or execution of a bribe to [Mandy] regarding her testimony in this matter. I never met with [Mandy] in the company of ... the District's counsel in this matter."

The District also submitted its attorney's declaration stating: "I never met with Mandy [U.] at my office in San Bernardino .... I never met with Mandy [U.] in the presence of Karen Pina .... I categorically and emphatically deny that I ever witnessed Karen Pina offer or execute a bribe to [Mandy] at any time."

B. *Analysis.*

A motion for new trial may be brought in a mandate proceeding; it is governed by the rules applicable to motions for new trial generally. (Code Civ. Proc., §1110.)

"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." *(Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387.) "All presumptions are in favor of the order, and it will be affirmed if it is sustainable on any grounds even though the reviewing court might have ruled differently in the first instance. [Citations.]" *(Wade v. De Bernardi* (1970) 4 Cal.App.3d 967, 971.)

"'The essential elements that must be established ... are: (1) that the evidence is newly discovered, (2) that reasonable diligence has been exercised in its discovery and production, and (3) that the evidence is material to the movant's case.' [Citation.]" *(Elysium Institute, Inc. v. County of Los Angeles* (1991) 232 Cal.App.3d 408, 438, quoting *"White v. Dorfman* (1981) 116 Cal.App.3d 892, 899.) The evidence must be "material in the sense that it is likely to produce a different result." (Horowitz v. *Noble* (1978) 79 Cal.App.3d 120, 138.) "'But newly discovered evidence to impeach or discredit a witness ... is not sufficient to require granting of a new trial. [Citation.]... *(Simmons v. Southern Pac. Transp. Co.* (1976).62 Cal.App.3d 341, 367, quoting *Lubeck v. Lopes* (1967) 254 Cal.App.2d 63, 68.)

"Ordinarily newly discovered evidence is looked upon with suspicion and disfavor."

*(National Elevator Services, Inc. v. Department of Industrial Relations* (1982) 136 Cal.App.3d 131, 137.) In particular, "the offer of a witness, after trial, to retract his sworn testimony is to be viewed with suspicion. [Citations.]" *(In re Weber* (1974) 11 Cal.3d 703, 722.)

The trial court could properly find that Mandy's recantation of her testimony would not have produced a different result. As the evidence at the hearing had already shown, Mandy told one story in her declaration, recanted that testimony, then recanted her recantation. Nevertheless, the trial court, acting as the trier of fact had relied on her testimony. This was not irrational or arbitrary. Mandy's testimony was corroborated by Aaron, and to some extent by Nancy. It also was corroborated significantly by Kerry, who was present when Mandy played - and Dunn listened to - a tape of one of her phone calls to Aaron. There was considerable evidence that Mandy was under Dunn's influence and would do whatever he asked her to do; while there was evidence that Nancy and Mandy knew each other, there was no evidence similarly suggesting that Mandy would he for Nancy. Mandy's latest recantation was cumulative. The trial court could reasonably conclude this new evidence did not change its mind.

For the same reasons)-the trial court could properly find Mandy's testimony that Pina had bribed her would not have produced a different result. Both Pina and the

District's attorney contradicted Mandy's testimony.9 Moreover, this evidence merely

---

9 Dunn argues their testimony that Pina did

tended to impeach or discredit Mandy. Thus, it did not require a new trial.

Finally, Dunn failed to show he had exercised reasonable diligence to discover this evidence. He had taken Mandy's deposition. His attorney could have asked Mandy all about her contacts with Pina and the District's attorney, and also about any reasons she may have had to shade or fabricate her testimony. Dunn failed to show his attorney did ask such questions, or, if he did, that Mandy failed to reveal the alleged bribe.10 Absent such a showing, the trial court could reasonably conclude Dunn could have discovered this evidence sooner.

It follows that the trial court did not abuse its discretion in denying the motion for new trial.

XI

---

not "bribe" Mandy did not squarely contradict Mandy's testimony that Pina agreed to make some kind of payments to her. The trial court could reasonably find it did. Moreover, Pina and the attorney did not merely deny "bribing" Mandy; they also denied that they ever both met with Mandy at the same time. This flatly contradicted Mandy's account.

10 Actually, at her deposition, Mandy testified Dunn had recently "asked me to call Karen P[i]na to tell her that I've heard that Mr. Young paid Nancy $3,000; and I was supposed to get some of that money, and I never received it." Thus, if the trial court did consider Mandy's deposition, it had all the more reason to find Mandy's claim that Pina had bribed her was not new evidence, but a lie Dunn had induced her to tell.

## DISPOSITION

The judgment is affirmed. The District shall recover costs on appeal against Dunn.

NOT TO BE PUBLISHED

/s/ Richli
J.

We concur:

/s/ Ramirez
P.J.

/s/ McKinster
J.

Fourth Appellate District, Division Two, No. E019255

IN THE SUPREME COURT OF CALIFORNIA

---

CHUCK DUNN, Appellant

v.

COMMISSION ON PROFESSIONAL COMPETENCE, Respondent

JURUPA UNIFIED SCHOOL DISTRICT, Real Party

In Interest

---

Appellant's petition for review DENIED.

SUPREME COURT

FILED

SEP 16 1998

Robert Wandruff Clerk

Deputy

GEORGE

Chief Justice

**STATEMENT OF CHARGES**

November 23, 1993

I, Kent Campbell, Assistant Superintendent, Personnel Services, charge that there exists cause to immediately suspend and dismiss Chuck Dunn as a permanent certificated employee of Jurupa Unified School District for:

(1) Immoral conduct [Education Code Sections 44939 and 44932(a)(1)]

(2) Evident unfitness for service [Education Code Section 44932(a)(5)]

(3) Dishonesty [Education Code Section 44932(a)(3)]

The specific acts or omissions which constitute the charges include the following:

1. On several occasions during the 1992-93 school year, you prepared math assignments for Nancy Woo, a 17-year-old female student, which she turned in as her own work. (Causes 2 and 3)

2. On at least two occasions in May and June, 1993, when Nancy Woo entered your

classroom to purchase a soda pop, you gave her a soft drink free of charge and made the comment:

> "We need to figure out how to get you out of your house this weekend so we can go some place." (Causes 2 and 3)

3. Toward the end of the 1992-93 school year, you called Nancy Woo at her home on numerous occasions. When Nancy asked for help on her homework, you made comments such as the following:

> "We have to figure out how you are going to pay me for all this, Dear Nancy."
>
> "You know what I need, I need a girlfriend." (Causes 1 and 2)

4. Toward the end of the 1992-93 school year, and during the summer of 1993, you called Nancy Woo at her home on numerous

occasions and made the following statements:

> "You'd be good in bed; any guy would be stupid not to want you."
>
> "You have a nice ass."
>
> "Are you a virgin?"
>
> "I'd really like to be with you."
>
> "We can work on our relationship after you get out of school."
>
> "You have really nice, soft lips and they looked really moist and kissable the other night." (Causes 1 and 2)

5. Toward the end of the 1992-93 school year and in June, July and August, 1993, you invited Nancy Woo to drive to your home on at least ten occasions. When she arrived, you directed her to park her car

r in the backyard or in your garage
ep her visit a secret. You stated
r, "Isn't that just great how that
out, no one will know." (Causes 2

g the months of June, July and
1993, you took Nancy Woo out for
on approximately ten separate
ons. Three of the restaurants were
izzler, Socorro's Mexican Food in
nga and The Wood House in West
. These surreptitious meetings
eld without the knowledge of her
s. (Causes 2 and 3)

about July 1993, you offered to get
e identification for Nancy Woo so
he could pose as a 21-year-old.
s 1, 2 and 3)

veral occasions during June, July
gust 1993, you solicited a sexual
onship with Nancy Woo by making the
ing statements:

I notice that you get



BEST AVAILABLE COPY

PUBLISHER'S NOTE:

THE FOLLOWING PAGE WAS UNAVAILABLE FOR FILMING:

153

imagined being with you."

These comments were made with sexual overtones. During the same conversation you repeated the assertion that you "wanted to work on having a relationship" after Nancy graduated. (Causes 1 and 2)

10. In June or July 1993, you took Nancy Woo to one of your rental properties to meet with a repair worker. You introduced her to the repairman as your "girlfriend." (Causes 1 and 2)

11. You gave a set of your car keys along with a car alarm to Nancy Woo and also added her to your automobile insurance in August 1993. (Causes 1 and 2)

12. In August 1993, you gave Nancy Woo a door knob for her bedroom door which matched the lock on your front door. In addition, you showed her where the spare key to your home is located so that she could let herself in. (Causes 1 and 2)

13. You purchased many gifts for Nancy Woo

during the 1992-93 school year and over the summer of 1993 including clothing, bathing suits, a vanity mirror and other items. (Causes 1 and 2)

14. At the end of the 1992-93 school year and, during June and July 1993, you offered to get the computer code from Barbara Bleck, Registrar, and change Nancy Woo's permanent grade report. You entered her confidential student file and photocopied her transcript, CTBS scores and class schedule. (Causes 1, 2 and 3)

15. You confided in Nancy Woo that a friend of yours offered to "shoot Mr. Tieri" because of an ongoing dispute between you and Vince Tieri, another teacher, but that you told him, "No, I want to do it the legal way." (Causes 1 and 2)

16. In July 1993, when you learned that Nancy Woo was dating someone else, you phoned her and made the following comments:

"I don't think you should be in a

relationship unless it's with me."

"I don't think you should hop into bed with anyone else."

"Nancy, I love you; don't be mad at me."

(Causes 1 and 2)

17. During the months of July, August, September and October 1993, you telephoned Mandy Utesch, an 18-year-old female student, on an almost daily basis to discuss your relationship with Nancy Woo. You told her that you and Nancy "were dating," but Nancy found someone else and you "want her back." (Causes 1 and 2)

18. On several occasions since July 1993, you asked Mandy Utesch to telephone Nancy Woo and report to you whether she was at home and where she was going. You stated you needed this information in order to follow Nancy and watch her. (Causes 1

and 2)

19. In August 1993, you told Mandy Utesch that you were in love with Nancy Woo. You also told her that you had given Nancy a set of your house and car keys. (Causes 1 and 2)

20. In August 1993, you admitted to Mandy Utesch that you were "stalking" Aaron Guy, Nancy Woo's boyfriend. You told her that on many occasions you have driven your car to his neighborhood, parked and watched his home. You also said you followed him when he left his house. (Causes 1 and 2)

21. In August 1993, you told Mandy Utesch that Nancy Woo had an abortion. (Causes 1, 2 and 3)

22. In August 1993, you followed Nancy Woo and Aaron Guy to the Riverside County Public Library at approximately 10:00 p.m. When you appeared on the street in front of them, they immediately left. (Causes 1 and 2)

23. In September 1993, you admitted to Mandy Utesch that you asked two men to watch Aaron's home. You mentioned to Mandy that the men were carrying guns. (Causes 1 and 2)

24. In September 1993, Aaron Guy telephoned your home to confront you about the two men who were seen hiding outside his home. He suspected that you were responsible for the trespassers. When he identified himself, you responded to him as follows:

> I love her [Nancy Woo], I will do anything for her. If I have to, I will kill you to get you out of the way. Aaron, do you have a reason to play this little game with me? This is no game, this is real. I have done it before and I will do it again. I

grew up in El Monte and it's really bad out there. I will have no trouble doing it to you. I can have you and your family killed. You have much more to lose than I do. Do you really think Nancy is worth it all? This is the last time I will ever talk to you ecuase if I have to, I will go down there and do it right now. (Causes 1 and 2)

25. In September 1993, the day following the telephone call referred to in charge 24, you telephoned Aaron Guy at his home and made the following threats: Aaron, you are in big trouble. You should not have told her [Nancy Woo] all the things you told her. I asked you not to call her anymore. You have five sisters, you have a mother and a father and I know about

the rest of your family.

You implied that you would harm his family if he continued to see Nancy. (Causes 1 and 2)

26. In September 1993, in the telephone conversation referred in charge 25, you also told Aaron Guy that nancy Woo had an abortion. When he asked if you were the father of the unborn child, you responded, "Well, things happen. I can't discuss that with you." (Causes 1, 2 and 3)

27. On or about October 22, 1993, on the evening of Jurupa Valley High School's homecoming dance, you discussed with Mandy Utesch details of Nancy Woo's date for the dance. You also told Mandy you were planning to drive to Raincross Square to watch Nancy and her date. (Causes 1 and 2)

28. On November 4, 1993, you telephoned Mandy Utesch to warn her that a high school counselor, Karen Pina, may contact her

for information about you. You instructed her to respond that she didn't know anything about you or your relationship with Nancy Woo. You specifically asked her to state that she "recently heard that Nancy Woo was using drugs for the past few months." (Causes 1, 2 and 3)

29. Pursuant to the certificated collective bargaining agreement, you were suspended without pay for five working days, March 8 through March 12, 1993, for various acts of serious misconduct, including acts of insubordination and failure to follow directives of your superior. Since that suspension, you have continued to defy administrative directives and engaged in other improper conduct by the acts described in Charges 30 through 36.

30. In or about March 1993, you advised the parent of Abrosia Gonzales, a Granite Hill School Student who was suspended, to

file child abuse charges against Mr. Hale, Principal of Sunnyslope School. (Cause 2)

31. In or about March 1993, you informed the parent of a Jurupa Valley High School student, Jor Arriola, also on suspension, that the school was: "out to get Joe," and that his counselor was substandard, only counseling "females 18 or older." (Cause 2)

32. In or about March 1993, you telephoned several students to discuss your suspension and budget issues. (Cause 2)

33. On March 3, 1993, you wrote a memo challenging Principal Alan Young's "manhood" and his "Christianity" and distributed that memo in a packet that you gave to parents, teachers and others in the community. (Cause 2)

34. On or about March 15, 1993, you harassed Vince Tieri, teacher, in front of students by making the statement "you should be sorry, you now owe me

$1,500.00." (Cause 2)

35. In April 1993, you sent a memo to Principal Alan Young containing several abusive and insolent statements, including the following:

> "I question your manhood and Christian practices."

You accuse the principal of "lying."

> "What I do to help kids is none of your business. You should treat all kids equal."

> "Too bad you are ashamed and afraid to let people know how unwise and unfair your actions are. I have written permission from the parents to use their students' name to defend their children from the

likes of you."

"I am not afraid and will never fear someone of your moral character."

"You are a coward."

"You hide behind a smoke screen of administration regulations."

"You need to understand the essence of Christianity."

"You need to be a man, give the kid's (sic) their money." (Cause 2)

36. In or about September 1993, you gave several confidential memos to Susan Loux, Press Enterprise reporter, for use in a newspaper article related to a grievance filed by you. (Cause 2)

37. On or about September 23, 1993, and on or about September 28, 1993, you gave confidential memos to Mr. Brockman, a

teacher, relating to the dispute between you and Mr. Tieri, teacher. (Cause 2)

38. At a meeting on October 5, 1993, with your Principal, Alan Young, in discussing your improper conduct, you uttered several threats toward the principal including the following:

> "What goes around -- comes around."
>
> "Take your best shot."
>
> "Your private life is known better than you think."
>
> "We'll see how long they [the District] keeps you." (Cause 2)

---

Kent Campbell
Assistant Superintendent,
Personnel Services

The undersigned declares under penalty of perjury that the foregoing is true and correct

to the best of his information and belief.

_____

Kent Campbell
Assistant Superintendent,
Personnel Services

EXHIBIT 16

DATE: April 28, 1993

TO: Alan Young

FROM: Chuck Dunn

SUBJECT: Response To Memorandum Of April 9,1993

I continue to disagree with your conclusion that Vince Tieri's March 15,1993, intrusion was justified. Moreover, I am mystified as to why Vince insists on maintaining contact with me. Isn't he the one who claims to live in fear of me? Isn't he the one who claims to be harassed by me?

It's not my perception that Vince Tieri interferes with the learning environment of my students. It is a fact that both my students and their parents realize. What was Vince's justifiable reasons for that intrusion? This situation has been going on for years as shown by student and parent complaints.

The following represents my responses to your issues numbered 1-7:

1) Alan, you continue to write your concocted script- "...You challenged my manhood and Christianity..."

When you went to the September 15, 1992 Riverside Community College board meeting, you identified yourself as principal of Jurupa Valley High School and a Christian member of Magnolia Baptist Church. You stated that both you and Doug Huckaby are members.

You stated, "to hold Doug responsible, flies in the face of what is effective and what is fair.

The punishment does not fit the crime if there was a crime." You quoted the apostle Paul in an attempt to justify Doug's position. Your statements prompted the next speaker, Deanna, who also quoted Paul, none should not have the appearance of evil. Alan, you at a public meeting, identified yourself as principal of Jurupa Valley High School, Christian, a member of Magnolia Baptist Church. A Christian would not support an individual who allowed or had knowledge of a stripper at a Public school. Alan, you do not understand the essence of Christianity.

If you did, you would treat everyone equal. A real man would your manhood and Christian practices.

I disagree with your statement that "my manhood and religious beliefs are not relevant to our disagreement." The total measure of how you have handled this disagreement is based on the type of man you are and how you practice your Christian principles. The crux of your thinking process is intimately linked to the type of man you are and how you practice your Christian principles. To give my students money to Vince Tieri, who testified - against an innocent young girl from Jurupa Valley, is very unchristian and childish.

2) Alan, you continue to write your concocted script

to call my father. That is another one of your lies.

I disagree with your portrayal.

I question you making your father, a seventy-seven year old man caring for a seventy-six year old wife, a stroke victim, an issue in our personal disagreement handled by you as a personal matter.

I did not threaten to call your father, I said, "I would give him the memos and perhaps he could give you fatherly advice to help you. Are you afraid your father would be fair and give the kids the $150.00 back?

3. Alan, you continue to write your concocted script:... that You once again harassed him (Vince) by saying that he now owed you $1500.

I disagree with your portrayal.

I question your designating my behavior as harassment by my asking for money owed to my students. Am I to understand that owe is synonymous with harassment? I explained when Vince said he was sorry, I assumed he had a change of heart.

4) Alan, you continued to write your concocted script…distributed confidential memos...You lied again.

I disagree with your portrayal.

I question the legal basis for your directive. I question the designation of confidential memo as 'confidential.' It in my memo, not yours. You gave it to me.

I have permission to use both the students names mentioned in your confidential memo. What I do to help kids is none of your business. You should treat all kids equal.

5) Alan, you continue to write your concocted script:"...that Joe's counselor wasn't a good counselor...

I disagree with your portrayal.

I question your " stirring up things"

The school bulletin provides information on students rights. The Guidance Coordinators answer questions related to students rights. A student who is "up for expulsion" is provided information related to expulsion proceedings, i.e., due process. It is common knowledge. I recommend TRASK to help parents and students. Your knowledge of Jurupa Valley High lacks. We have coordinators not counselors.

6) Alan, you continue to write your concocted script:"...none of my business."

I question your portrayal. I question why you take it go personal. I merely answered Mrs. Gonzales' question.

The student needed help, go did her parents. It a quite obvious that her R.S.P. teacher did not provide information to help the student. We all know why, don't we? Your wife did not provide the parents with help. The child was bruised, child protection needed to help. A principal should not hurt a little girl.

7) Alan, you continue to write your concocted script: ... that you had discussed the budget issue with students in violation of my directives. . . I do not confirm any of your lies.

I question your portrayal. I question the legal basis for your directive.

I have read directives A-E. The legalese " cease and desist" warms my heart. Here are my responses to the directives A-E in the memo dated April 9, 1993.

A. " You are directed not to discuss the budget issue, your suspension, my religious beliefs, or any topic not appropriate for public domain with students, employees, parents, or Community people."

Remember, we are Americans. You may think you are a God, but you lark authority to determine what is appropriate for public consumption.

Are you ashamed of your actions? Why don't we have a mock trial and let the students be the jury? You would be convicted. Your attempt to isolate me will not work, there is a first amendment, 'Freedom of Speech".

B. 'You are to cease and desist from your harassment of Mr. Tieri with statements such as 'whereas my money, boy' or 'now you owe me $1500-00'. or in any other form your word is harassment. Tieri should not have spent the money. You should have followed the memo to discourage unnecessary purchases and encourage savings". Remember, our seniors must pay ten dollars each to graduate at Jurupa Valley High because we are broke. Why art we broke? Could it be wasteful spending?

C. "You are to cease and desist from your harassment of me or my family in any form including, but not limited to, threatening or disrespectful statements, picketing my church, or calling my relatives."

Are you so ashamed of your behavior that even your own family must be kept in the dark? I have never threatened or harassed your family. This is another misguided perception on your part. My suggestion was to let your father read the memos and give you some fatherly advice on how to be fair.

The people, as taxpayers and fellow Christians should know all about your favoritism and discrimination. I realize that would prove very shameful to you Remember, you made your own bed, now you must sleep in it.

D. "You are to cease and desist undermining administrations efforts to discipline students on this campus and on other campuses.

The assumption on your part is only that, another lie. I will always help students and parents to help solve problems. Our school system should also, but it often fails. Ask the parents.

E. "You are to cease and desist from sharing confidential information, especially that clearly marked "confidential", which mention personnel or students, including this memo with students, employees, parents, and community members."

Too bad you are ashamed and afraid to let people know how unwise and unfair your actions are. I have written permission from the parents to use their students name to defend their children from the likes of you.

I am not afraid and will never fear someone of your moral character. You are a coward. You hide behind a smoke screen of administrative regulations. You need to understand-the essence of Christianity. You need to be a man, give the kid's their money.

The regulations A-E give the appearance that you are attempting to legally address this personal disagreement.

Is a restraining order next?

It is almost blasphemous that you would send this memorandum on Good Friday.

I would like to reflect on the judgment of Jesus by Pontius Pilot: In considering the fate of Jesus, Pilot capitulated to popular whim. To this day: How is famous Pilot remembers.

EXHIBIT 18

JURUPA VALLEY HIGH SCHOOL

10551 Bellgrave Ave Mira Loma, Ca 91752

(714) 360-2603

OFFICE OF THE PRINCIPAL

DATE: January 27, 1993

TO: Kent Campbell, Assistant Superintendent Personnel Services

FROM: Alan Young, Principal, Jurupa Valley High School

SUBJECT: Chuck Dunn

Chuck Dunn has in the past, both at Jurupa Middle School and at Jurupa Valley High School, used and/or involved students in political or professional conflicts between himself and others. Jurupa Valley administrators have directed him not to do so. On October 28, 1992, I directed Mr. Dunn not to discuss a specific matter relative to department budget procedures. A memo to that affect should be in his personnel file, and is also attached.

Mr. Dunn is currently distributing and having students distribute petitions (see attached), again relative to the some topic. In my opinion, his action is insubordinate in that it violates my directive.

I request your advice as to what disciplinary action is in order for Mr. Dunn. Is a suspension appropriate? Is dismissal in order as per Woodland vs. Commission on Professional Competence (1992)?

AY:dt
MAC:ac2

Attachments: Memo dated 10-28-92
Petition dated 1-15-93
Zampi and Associates Ruling

EXHIBIT 21

Jurupa Valley High School

**MINUTES OF THE PRINCIPAL'S CABINET MEETING**

**April 6, 1993**

The following people were present:

Alan Young, Ron Needham, Rex Moore, Diana Trust, Gary Clem, Donn Cushing, Shirley Gonzalez, Virginia Huckaby, Gary Lesh, Sheila Medina, Pat Monaco, Bill Pine, Stella Sloan, Vince Tieri.

Vince Tieri brought to the attention of cabinet members the problems with the Sexual Harassment Policy and students making false accusations toward teachers. He stated that students regard the policy as humorous, and that it doesn't appear that teachers have any resource if a false accusation is made. Alan stated that he is aware of this situation and shared this with the school district's attorney. He then stated the burden of proof is on the district, and that the teachers' association on and other groups as well need to lobby for some considerations in this matter. Alan stated that he agreed that students need to be held accountable for this and it will be helpful is there was something in the Education Code. Vince suggested that all teachers talk to their NEA-J representative and also to talk to members in their departments about this serious problem.

Meeting was adjourned at 3:40 pm

ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
1140 WEST BERNARDINO COURT, SUITE 174
SAN DIEGO, CALIFORNIA 92127
619-485-9526 619-485-9412 FACSIMILE

The Honorable Manuel A. Ramirez, Presiding Justice
The Honorable Betty A. Riclili,
Associate Justice
The Honorable Art W. McKinster, Associate Justice
California Court of Appeal
Fourth Appellate District, Division Two
303 West Fifth Street
San Bernardino, California 92401

RE: CHUCK DUNN V. COMMISSION ON PROFESSIONAL COMPETENCE, ET AL,
CASE NO. E019255 - REQUEST FOR PUBLICATION

Dear Presiding Justice Ramirez, Associate Justice Richli, and Associate Justice McKinster:

We write this letter pursuant to Rule 978 of the California Rules of Court for the purpose of respectfully requesting that this Court certify for publication its decision in CHUCK DUNN V COMMISSION ON PROFESSIONAL COMPETEARCE, ET, AL Cal.App.4th Cal.Rptr. _, Case No. E019255, filed June 5, 1998.

The undersigned currently represents the Real Party in Interest, Jurupa Unified School District (the "District"), as well as numerous other school districts throughout the State of California that are subject to the California Education Code provisions governing the dismissal of certificated employees, California Education Code, Title 2,'Division 3, Part 25, Chapter 4, Article 3, Part 25, Chapter 4, Article 3,(commencing with Section 44930.)

**I. THE COURT'S DECISION MEETS THE PUBLICATION STANDARDS SET FORTH IN RULE 976 OF THE CALIFORNIA RULES OF COURT FOR AT LEAST TWO OF THE SPECIFIED REASONS: (1) IT APPLIES AN EXISTING RULE OF LAW TO A SET OF FACTS SIGNIFICANTLY DIFFERENT FROM THOSE STATED IN PUBLISHED OPINIONS; AND (2) IT INVOLVES A LEGAL ISSUE OF CONTINUING PUBLIC INTEREST.**

There can be little doubt that our educational system is of profound importance to our democratic society. However, in the interest of protecting our children and the entire educational system, the Legislature granted school districts the right to terminate tenured teachers. See, California Education Code, Title 2, Division 3, Part 25., Chapter 4, Article 3, commencing with section 44930. In order to implement the purposes set forth in these sections, the Legislature enacted Education Code section 44932 which requires that tenured teachers be dismissed "for cause" as set forth in that statute.

This appeal relates to the application of the "for cause" standards in Education Code Section 44932 to a case in which a

teacher has engaged in dishonest and immoral conduct, and whose entire course of action demonstrated an "evident unfitness for service." Much of the conduct at issue concerns the relationship between a student and the teacher. However, unlike other published decisions regarding dismissal for teacher misconduct, the misconduct in this case was not found to be "sexual" or "romantic" in nature. Instead, the teacher's conduct was characterized by extravagant gifts, undocumented loans, secret trips, insurance fraud, and threats to the student's boyfriend and the boyfriend's family. As this Court noted in its decision, at page 32, the Commission on Professional Competence likened the relationship to Henry Higgins and Eliza Doolittle.

This case establishes the principle that a teacher engaged in a non-sexual, non-romantic relationship with a student, even outside school -grounds, can still be terminated for cause if that relationship is tainted by conduct which is immoral, dishonest, or which demonstrates an evident unfitness to teach, This case further stands for the proposition that California Education Code Section 44932 provides teachers with adequate notice, for the purpose of meeting due process notice requirements, that conduct toward a student which is non-sexual and non-romantic, and which occurs off-campus can constitute "cause" for that teacher's dismissal.

The court's decision also addresses several defenses common in teacher dismissal hearings, For example, the court considered, analyzed and eventually rejected the teacher's contentions that (1)the decision of

the Commission on Professional Competence was based on uncharged conduct, (2) the Commission erroneously excluded evidence proffered by the teacher, (3) the teacher was dismissed in retaliation for the exercise of his First Amendment rights, and (4) the trial court should have granted a new trial based on the recantation of testimony from one of the District's witnesses. The Court's analyses of these issues in its decision can stand as a model for school districts and teachers alike who are, or may become engaged in a termination hearing.

Clearly, significant public interest attaches to decisions concerning the termination of a tenured teacher. School administrators, teachers, and teacher representatives all depend on Court of Appeal and Supreme Court decisional law to assist in the interpretation and application of Education Code, Title 2, Division 3, Part 25, Chapter 4, Article 3. School administrators, having only the bare language contained in Section 449-')2, are given little guidance from this statute when determining whether to impose discipline and undergo the expensive and time consuming process of imposing discipline. Similarly, teachers, being subject to the loss of permanent public employment for violation of Education Code section 44932, are entitled to as much guidance as possible so that they will know more fully the practical application and meaning of the causes for discipline set forth in Section 44932. The Court's opinion in this case offers such guidance and will be of particular value for those non-attorneys school administrators charged with the daily

implementation of the subject Education Code provisions.

For the foregoing reasons, the Jurupa Unified School District respectfully requests that this Court reconsider its decision to not publish its opinion, and instead order that this opinion be published.

Very truly yours,

ATKINSON, ANDLESON, LOYA, RUUD & ROMO

NICHOLAS T. CALDERON

cc Benita Roberts, Superintendent
Gregory Brittain, Esq.

**EXHIBIT 59**

A$150 Dispute Erupts Into School Feud

Jurupa Teacher Chuck is known for his maverick and unconventional methods. The quarrel over spending of classroom funds is in arbitration.

Chuck Dunn is not your average teacher. He's the one who coached students in civil disobedience when they asked him how to protest a school board decision to rename Jurupa Junior High School to Jurupa Middle School a few years ago.

Some administrators blamed Dunn when students circulated petitions, staged a classroom walkout and even showed up at back to school night with picket signs. Dunn has denied encouraging any students to take part.

And he didn't win over many administrators by charging discrimination when student aides were removed from his special education class room in 1988. He publicly criticized the Jurupa Unified school District board of trustees for the move. Later, the aides were returned.

His unconventional style has won him a loyal following of students and parents, but left some of his bosses wary of him.

Some of his supervisors have said they are downright frightened by the fervor with which he has approached his latest challenge: trying to get back $150 that his supervisor spend on paper

for photocopies after Dunn failed to spend the money on pencils, video's or other materials for his Jurupa Valley High School classroom by deadline more than a year ago.

Dunn is protesting the funding shift by Vince Tieri, head of special education department at the school, even though Teiri's action was within the spending guidelines and was conducted by Principle Alan Young.

Dunn said he thinks forcing teachers to spend classroom money by the end of the year instead of automatically carrying it over for use next year leads to wasteful spending and he wants everyone to know it. District policy allows principles to decide whether funds will be rolled over or spent on deadline. Dunn has told his students that Tieri took their money. In memos to the principal, Dunn has called Tieri a thief and the principal a coward. He has questioned the principal's " manhood" and according to one memo from the principal, Dunn threatened to organize a protest with picket signs at the principal's church to expose him as a " lousy Christian" .

The shaggy haired Dunn. who sports sandals and a backpack, hands out copies of his memos and the district's responses, some stamped confidential, to those who visit his Glen Avon store. Rebel Sports.

It needs to be brought to everybody's attention, Dunn said. "He took my kids' money is far as I'm concerned. We'll see who wins in the end."

The principal's attempts to quiet Dunn have failed. When Dunn continued to talk to students and others about the dispute despite repeated warnings not to, he was placed on a five-day. unpaid suspension, in March.

Dunn is challenging the suspension with the support of the Citrus Bell Uniserv teachers union. In a letter, the union claims the suspension Is unwarranted because the school district did not show Dunn harassed Tieri and because the district cannot restrict Dunn's speech.

Dunn also has filed a complaint with the U.S. Department or Education's Office for Civil Rights, saying Tieri discriminated against Dunn's students because the $150 was not spent on them.

When told about Dunn's complaint, one state expert said it seemed to have little merit.

If(the $150) was spent on Xerox paper for the department, it's an appropriate expenditure, said Allan Simmons, manager of the monitoring In projects unit for the special-education division of the state Department of Education.

Arbitration between the school district and the teachers union that represents Dunn is in progress. Costs are estimated at about $1.500 for the school district. Dunn plans to take his gripe to court if he is not satisfied.

Meanwhile, Tieri said Dunn has smeared his reputation on campus. "He's got people believing I took his money." Tieri said. "I've got students who point me out across campus and say. "There's the guy who took our money.' I don't slough that off.

"I will not capitulate to someone willing to use bully tactics, willing to disregard the responsibility of speech as quickly as they tout freedom of speech. When It becomes a matter of principle, you either stand up or roll over. I'm not round."

School and district administrators have declined to comment on the dispute over the $150 because It Is a personal matter. But in memos from the district that Dunn has handed out. Young and Tieri said they feel threatened by Dunn's " irrational" behavior.

Dunn said his suspension in March was not his first. In 1989, he said was placed on a day's suspension when the district received an anonymous letter saying Dunn was going to shoot an administrator.

Dunn said the allegation was ludicrous. He said It was probably an effort to make him look bad after he protested the removal of student aides from his classroom.

Dunn said he has taken students river rafting and gold mining on chaperoned field trips. He said he tries to visit the homes of each of his students before classes begin. He helps pay when students cannot afford lunch or a yearbook.

Many parents applaud his willingness to buck the system for efforts he thinks will benefit his students.

" He's a dinosaur," said Gerald Adair, whose children were taught by Dunn in the mid-1980s. "They don't make them like him anymore. He's the only remaining freedom fighter at the Jurupa school district."

To critics, he is a relic from the 1960's, bent on challenging authority figures regardless of what can be gained.

"He resents, authority," said Jurupa Unified School District Trustee David Barnes. "The way he dresses is still very anti-establishment. It's 'I'm going to take on the big corporate office and all the bureaucrats' that's the mentality he has. It has been one issue after another over and over and over."

Dunn, 53 headed a local committee to elect Ross Perot when the Texan ran for president. Perot remains his hero. "He calls it as it Is." Dunn said.

Several days a week. Dunn volunteers to paint out graffiti in the Jurupa area, an effort that has won the respect of many, including school district Trustee Mary Burns.

Controversial people are kind of like a work of art: It's all in the perspective." she said. "You could look at Dunn as a radical rebel and activist. But he's a man standing up for his community and doing what he thinks is best . . . I think he deserves an award for his community service."

Dunn, accustomed to unsettling administrators. even raised fellow teachers' eyebrows a couple of years ago by applauding the suggestion that the school board cut teacher wages to help balance Its budget.

"I told them the teachers are very well paid." he said.

Dunn Is tenured, owns his own store and has other private ventures.

**DECLARATION OF BILL HECK**

I, BILL HECK, declare as follows:

1. I have personal knowledge of the matters set forth herein and if called as a witness could testify competently thereto.

2. I was a member of the Jurupa Unified School District Board for eight years from the late 70's to the mid 1980's.

3. In all my years on the Board, I do not recall a single case where we sought to dismiss a teacher for alleged misconduct before law enforcement and the district attorney's office completed their investigation. In addition, I do not recall a single case where we sought to dismiss a teacher in the absence of felony charges against a teacher for the alleged misconduct.

Furthermore, pending conclusion of law enforcement's and the District Attorney's investigation, the teacher was always suspended with pay.

I am familiar with the allegations against Mr. Dunn, and while I cannot discuss specific cases, there were cases while I was on the Board where the teacher was accused of more serious misconduct than was alleged against Mr. Dunn. If the District Attorney's office reduced or dropped the charges, we took the teacher back.

I declare under penalty of perjury, the foregoing is true and correct.

Executed 11/15/1995, at Riverside, California.

Bill Heck

No. 98-1606

Supreme Court, U.S.
FILED
MAY 4 1999
OFFICE OF THE CLERK

IN THE
# Supreme Court of the United States

CHUCK DUNN,

*Petitioner*,

*v.*

THE COMMISSION ON PROFESSIONAL COMPETENCE,

*Respondent*,

JURUPA UNIFIED SCHOOL DISTRICT, *et al.*,

*Real Party in Interest.*

*On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division Two*

## REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION

NICHOLAS T. CALDERON
*Counsel of Record*
WARREN S. KINSLER
ATKINSON, ANDELSON,
LOYA, RUUD & ROMO
*Attorneys for Real Party in Interest*
11440 West Bernardo Court
Suite 174
San Diego, California 92127
(619) 485-9526

152796

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

## QUESTIONS PRESENTED

1. Did the Real Party in Interest defeat Petitioner's First Amendment claims by demonstrating that the District would have dismissed Petitioner even in the absence of his allegedly protected speech?

2. Was Petitioner afforded due process of law when his public school employer gave him prior notice of the charges for which he was to be dismissed and an opportunity to contest those charges at an evidentiary hearing?

## PARTIES TO THE PROCEEDING

The Petition for Writ of Certiorari ("Petition") accurately listed the parties to the proceedings below except that the individual members of the Real Party in Interest's Governing Board of Trustees were also named as parties in the state court proceedings. The parties not named in the Petition include Sandra Ruane, Mary Burns, Holly Hanke, John Chavez, and Sam Knight. Sandra Ruane and Holly Hanke no longer serve as members of the Real Party's Governing Board. No specific or direct relief was sought by Dunn against these individually named parties.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | I |
| Parties to the Proceeding | ii |
| Table of Contents | iii |
| Table of Cited Authorities | iv |
| Opinions Below | 1 |
| Constitutional and Statutory Provisions Involved | 3 |
| Statement of the Case | 4 |
| A. Dunn's Relationship with Nancy | 5 |
| B. Dunn's Conduct Toward His Supervisors, Tieri and Young | 6 |
| C. Dunn's Due Process Claims | 9 |
| Reasons for Denying the Writ | 10 |
| I. Because The District Proved That Dunn Engaged In Independent Misconduct Sufficient To Warrant His Dismissal, Dunn's First Amendment Claims Must Fail. | 10 |
| II. Dunn Was Afforded Due Process | 15 |
| Conclusion | 17 |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Brewster v. Board of Education*, 149 F.3d 971 (9th Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1252 (1999) ..... 11

*Connick v. Myers*, 461 U.S. 138, 246, 103 S. Ct. 1684, 75 L. Ed. 843 (1983) ..... 13, 14

*Lyons v. Security Pac. Nat. Bank*, 40 Cal. App. 4th 1001, 48 Cal. Rptr. 2d 174 (1995) ..... 14

*Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) .....3, 11, 12, 13

*Parsons Steel Inc. v. First Alabama Bank*, 474 U.S. 518, 106 S. Ct. 768, 88 L. Ed. 2d 877 (1986) ... 14

*Roe v. City and County of San Francisco*, 109 F.3d 578 (9th Cir. 1997) ..... 13

*Umbehr v. Board of County Comm'rs*, 518 U.S. 668, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996) ..... 11, 13

**Statutes:**

28 U.S.C. § 1738 ..... 3, 14

California Education Code § 44932(a)(1) ..... 2

*Cited Authorities*

*Page*

California Education Code § 44932(a)(3) ..... 2

California Education Code § 44932(a)(5) ..... 2

**United States Constitution:**

First Amendment ..... *passim*

**Rule:**

United States Supreme Court Rule 14(i) ..... 1

Real Party in Interest Jurupa Unified School District, Sandra Ruane, Mary Burns, Holly Hanke, John Chavez, and Sam Knight (hereinafter referred to collectively as "District") respectfully request that this Court deny Petitioner Chuck Dunn's (hereinafter "Dunn") Petition seeking review of the California Court of Appeal decision in this case.

## OPINIONS BELOW

On May 9, 1994, arbitrator Kenneth A. Perea, issued a decision, entitled Arbitrator's Findings and Award, in a contractual grievance arbitration upholding Dunn's five (5) day suspension from employment because of his inappropriate communications and conduct toward two of his supervisors, Vince Tieri ("Tieri"), and Principal Alan Young ("Young.") (*See* Appendix To Petition For Certiorari[1] ("App."), pp. 56-83.)

On April 21, 1995, Respondent Commission on Professional Competence ("CPC") issued its ruling that Dunn should be dismissed from employment with the District. The CPC concluded that Dunn should be dismissed from employment on the basis of three completely independent grounds: (1) engaging in immoral conduct; (2) dishonesty; and (3) evident unfitness for service. (*See*

---

1. Dunn filed and served upon the District an "Appendix To Petition For Certiorari" which is replete with misspellings, omitted text, duplicate text, and other errors so significant that it is clear that Dunn failed to provide this Court with the accurate record required under Supreme Court Rule 14(i). Consequently, the District requests that this Court exercise its discretion under Rule 14(4) to deny the Petition on this ground alone.

California Education Code §§ 44932(a)(1), (3), and (5), respectively.)

The CPC held that the District established cause for Dunn's dismissal with respect to two entirely different courses of conduct. First, Dunn was dismissed because of his abusive and insubordinate conduct toward his supervisor Tieri and his principal, Young (App., pp. 45-48.) Second, Dunn was dismissed because of his obsessive relationship with a high school student named "Nancy." (App., pp. 43-55.)

In addressing Dunn's claim that the First Amendment protected him from dismissal from employment with the District, the CPC relied upon Arbitrator Perea's decision of May 9, 1994, and the res judicata and collateral estoppel effects of that unappealled and unchallenged decision, as California law required. (*See* App., pp. 11-12, n.5.) The CPC held that the issue of whether Dunn's speech was protected activity was determined against him in the earlier arbitration proceeding and that the arbitrator's decision precluded Dunn from arguing to the contrary in the CPC hearing. Nevertheless, the CPC also independently determined that Dunn's First Amendment defense lacked merit. (App., pp. 49-53.)

Dunn then filed a Petition for Writ of Mandamus in the Superior Court of California, County of Riverside, which was directed against the CPC and the District. The Riverside Superior Court, exercising its independent judgment on the facts and law of the case, denied the Petition for Writ of Mandate. The Superior Court concluded that "all factual determinations of Respondent CPC are supported by the weight of the evidence and that all of its legal rulings were correct." (App., p. 91.)

Dunn filed an appeal before the California Court of Appeal for the Fourth District, Division Two. The Court of Appeal issued its decision on June 5, 1998. (App., pp. 92-147.) The Court of Appeal exercised its independent powers of review in addressing Dunn's First Amendment claims. While Arbitrator Perea and the CPC held that Dunn's speech was not protected by the First Amendment because it did not concern a matter of public importance, the Court of Appeal *took an independent approach and assumed, for the sake of argument, that Dunn's conduct was protected by the First Amendment.* (App., p. 135, "We may assume, without deciding, he [Dunn] is correct" [that his speech was protected.] ) Nevertheless, the Court of Appeal held that under *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 287 [97 S .Ct. 568, 50 L. Ed. 2d 471] (1977) , Dunn's dismissal must stand because the District impliedly showed that it would have dismissed Dunn for his conduct with Nancy and Aaron even in the absence of Dunn's allegedly protected conduct toward Tieri and Young. (App., pp. 135-136.)

Dunn next filed a Petition for Review before the California Supreme Court. Without comment, the California Supreme Court denied the Petition for Review on September 16, 1998. (App., p. 148.)

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those Constitutional provisions noted in the Petition, this case also involves 28 U.S.C. § 1738, which provides, in pertinent part,

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

## STATEMENT OF THE CASE

This matter involves a dismissal proceeding brought by the District against Dunn, a permanent certificated employee of the District.

Respondent CPC, the statutory authority empowered to conduct a certificated employee dismissal hearing, concluded, after a lengthy hearing, that Dunn should be dismissed from employment on the basis of three completely independent grounds: (1) engaging in immoral conduct, (2) dishonesty, and (3) evident unfitness for service, with respect to two entirely different courses of conduct.

The CPC held that Dunn could be dismissed because of his obsessive relationship Nancy and because of because of his abusive and insubordinate conduct toward his supervisors Tieri and Young. (App., pp. 43-55, "Determination of Issues.")

**A. Dunn's Relationship with Nancy**

Beginning in the 1990-91 school year and continuing until October 1993, Dunn developed what was characterized by the CPC as "an extraordinary preoccupation with Nancy." (App., p. 25, Finding 21.) The CPC further explained Dunn's behavior toward Nancy:

> . . . [Dunn] became so obsessive of Nancy, her time, her interests, her activities, and her future, that his conduct passed well beyond that expected in an ordinary friendship, in a student-teacher relationship, or even in a parent-child relationship . . .

(App., p. 25, "Finding 21.")

Dunn's immoral conduct with Nancy included: spending an incredible amount of time alone with Nancy without her parents' knowledge (App., p. 25, "Finding 21."); spending approximately $1,419 in less than one and one-half months, buying Nancy clothing, gifts and dinners (App., p. 27, "Finding 23."); providing Nancy with a locking doorknob for her bedroom which was keyed to match the door to his home (App., p. 28, "Finding 24.") and; providing false information to his insurance carrier for the purpose of adding Nancy to his automobile insurance policy. (App., pp. 29-31, "Finding 27.")

Once it became apparent that Nancy was no longer interested in Dunn and that she now had a boyfriend, Dunn became even more obsessed with her. (App., pp. 31-32, "Findings 28 and 29.") Then, in October 1993, incredibly, Dunn called Nancy's boyfriend, "Aaron G." and told him, in pertinent part,

> I [Dunn] care for her [Nancy], and I will do anything for her. If I have to, I will kill you [Aaron] to get you out of the way. Aaron, do you have a reason to play this little game with me?

(App., p. 34, "Finding 32.")

The CPC concluded that the testimony and evidence produced at the hearing supported a determination that Dunn's relationship with Nancy constituted immoral conduct, dishonesty and established his evident unfitness for service. (App., pp. 43-54, "Determinations 1-6.")

**B. Dunn's Conduct Toward His Supervisors, Tieri and Young**

In addition to his conduct toward Nancy and her boyfriend, the CPC also found Dunn's conduct toward Tieri and Young established, independent from his conduct toward Nancy and Aaron, his dishonesty and evident unfitness for service. (App., pp. 45-53, "Determinations 2-5.")

During the 1991-92 school year, Dunn became upset with a directive he was given by Tieri, Head of the Special Education Department, concerning the disposition of

unspent supply funds. In response to his disagreement with Tieri (and Young, who supported Tieri), Dunn embarked on a pattern of abusive, insulting and insubordinate conduct against his supervisors which he stubbornly refused to cease. (App., pp. 11-14, "Finding 6.")

Dunn became openly hostile to both Tieri and Young and sent them several hostile memos which included personal attacks. In response to such conduct, he was suspended without pay from March 8 through March 12, 1993. (App., p. 82, "Arbitrator's Findings and Award.") However, upon his return from his suspension, Dunn renewed his personal and hostile attacks against Tieri and Young. (App., pp. 15-21, "Findings 8-14.") The CPC correctly concluded that such conduct established Dunn's evident unfitness for service. (App., pp. 45-53, "Determination of Issues 2, and 5.")

The CPC also independently analyzed Dunn's First Amendment claims. The CPC noted in its decision that arbitrator Perea

> determined from the content, form, and context of Respondent's [Dunn] statements and memos published before April 1993 that respondent's "speech was not designed to enable the public to make informed decisions about the operation of their public school system," but was, instead, "a matter of personal concern rather than a matter of public interest" . . .

(App., pp. 52, 79-82.)

In turn, the CPC, using its independent judgment, determined that the primary purpose of Dunn's "speech" was to provoke his supervisors Tieri and Young, or was simply an effort to conduct his private dispute in public. (App., p. 53.)

The Superior Court, exercising its independent judgment, found that all factual determinations by the CPC were supported by the evidence, and that all of its legal rulings were correct. (App., p. 91.)

Upon appeal, Dunn again asserted that his First Amendment rights were violated by his dismissal. Again, the Court of Appeal, like arbitrator Perea, the CPC, and the Superior Court before, held that Dunn's First Amendment claims were invalid.

In this Petition, Dunn asserts, *inter alia*, that the Court of Appeal failed to exercise its independent judgment. However, the Court of Appeal decision itself proves Dunn is wrong. The Court of Appeal, unlike arbitrator Perea, the CPC and the Superior Court, did not simply hold that Dunn's speech was unprotected, but instead assumed, for the sake of argument, that his speech was protected. (App., p. 135.)

However, the Court of Appeal correctly analyzed Dunn's First Amendment claims with reference to the legal standards set forth by this Court. It denied Dunn's claims stating,

> But even assuming constitutionally protected conduct was a substantial factor in the District's decision to dismiss Dunn, the dismissal may stand if the District can show it would have

> reached the same decision even in the absence of the protected conduct. (*Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 287 [97 S. Ct. 568, 50 L. Ed. 2d 471] (1977); *Williams v. City of Los Angeles*, 47 Cal.3d 195, 206 (1988).

The Court of Appeal affirmed that in its judgment such a showing was made by the District in the CPC hearing. (App., p. 138.)

### C. Dunn's Due Process Claims

The Court of Appeal also addressed Dunn's due process claims. Dunn challenged the Court of Appeal decision on the basis that he was not given fair notice by the District that his conduct with regard to Nancy could lead to discipline. The charges against Dunn relating to Nancy included immoral conduct, evident unfitness for service and dishonesty. (App., pp. 149-161, Statement of Charges, ¶¶ 1-28.)

The Court of Appeal held that the Statement of Charges against Dunn was sufficient to notify him of the actions which subjected him to discipline and to provide him with sufficient knowledge to prepare a defense. (App., p. 129.) The Court of Appeal noted that the terms "immoral conduct," "dishonesty," and "evident unfitness for service" have been judicially construed to imply a requirement that these types of conduct indicate an unfitness to teach, and as so construed, are not unconstitutionally vague.

## REASONS FOR DENYING THE WRIT

The primary thrust of Dunn's Petition is that his dismissal violated the First Amendment because he was dismissed, in part, for conduct that the courts *should have found* to be protected speech. Indeed, Dunn never admits that none of the courts or triers of fact below found his speech and/or conduct to be protected by the First Amendment.

Dunn also raises two collateral issues, asserting that the law in First Amendment cases is either unclear, or that there is a split between the Federal Circuit Courts of Appeal on an issue relevant to this case. As demonstrated below, both issues are merely red herrings.

### I.

### BECAUSE THE DISTRICT PROVED THAT DUNN ENGAGED IN INDEPENDENT MISCONDUCT SUFFICIENT TO WARRANT HIS DISMISSAL, DUNN'S FIRST AMENDMENT CLAIMS MUST FAIL.

Dunn argues that he was dismissed for exercising his First Amendment rights because the District charged him with: (1) sending a memorandum, dated April 23, 1993, to Young which included specific personal and offensive comments, and (2) revealing the contents of confidential memos to a newspaper reporter for the Press-Enterprise, and to a fellow teacher.

Dunn further asserts that the Court of Appeal erred in its decision because (1) it failed to exercise its independent judgment when reviewing the trial court's decision; and

(2) it failed to find that Dunn's First Amendment activities were an actual, material, and substantial disruption to the education process. Dunn's assertions fail for at least the following reasons.

First, Dunn completely ignores that fact that the CPC, the Superior Court and the Court of Appeal each independently found sufficient cause to dismiss Dunn even in the absence of his allegedly protected conduct. Dunn's conduct with Nancy and Aaron was considered by the CPC to be more than sufficient to justify his dismissal, and Dunn has never asserted that his conduct toward Nancy and Aaron was protected by the First Amendment. (App., pp. 43-45, 48, Determinations 1 and 3.)

When a public employee alleges that he has been discharged for exercising First Amendment rights, courts must engage in a three-part inquiry: to prevail, a public employee must prove (1) that the conduct at issue is constitutionally protected, and (2) that it was a substantial or motivating factor in the dismissal. If the employee discharges that burden, (3) the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct. (*Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); *Umbehr v. Board of County Comm'rs*, 518 U.S. 668, 116 S. Ct. 2342, 2347, 135 L. Ed. 2d 843 (1996); *Brewster v. Board of Education*, 149 F.3d 971, 979 (9th Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1252 (1999).)

Thus, even if a public employee's speech affects a matter of public concern, and it is a substantial factor in a decision to dismiss the employee, the dismissal must stand

if the employer demonstrates that it would have reached the same decision even in the absence of the protected conduct. (*Mt. Healthy, supra*, at 429 U.S. 287, 97 S. Ct. 568, 50 L. Ed. 2d 471.)

As the opinions of the CPC, the Superior Court and the Court of Appeal reveal, the District established that it would have dismissed Dunn because of his conduct toward Nancy and Aaron, even in the absence of his allegedly protected speech. Because, under the authority of *Mt. Healthy, supra*, and its progeny, the dismissal was appropriate even if Dunn's speech was protected, the CPC, Superior Court and Court of Appeal did not have to engage in the useless intellectual exercise of determining whether Dunn's speech was a matter of public concern, or whether his speech constituted a "substantial disruption" of the workplace. Such inquiries are relevant in cases in which the only cause for dismissal is the allegedly protected speech or conduct, but they are completely irrelevant to cases, like the present one, in which the employer has a completely sufficient and independent cause for dismissing an employee. Dunn's suggestion that courts must engage in an analysis of these issues in a mixed motive case where sufficient independent causes exist to justify a dismissal simply reflects his failure to understand First Amendment law, and more important, reflects his unwillingness to accept responsibility for his misconduct toward Nancy and Aaron.

As the Court of Appeal noted in its Opinion,

> Just as we decline to permit school authorities to mask an unconstitutional dismissal behind a statement of valid causes, so we cannot allow a teacher genuinely dismissed for valid causes to

> be reinstated because school authorities were also displeased with his exercise of constitutional rights. If it otherwise a teacher about to be dismissed for valid causes could insulate himself from the dismissal simply by engaging in political activities offensive to his superiors. (*Bekiaris v. Board of Education*, 6 Cal.3d 575, 593, n.12 (1972).).

(App., p. 137. )

Second, Dunn's speech and conduct toward Tieri and Young was not protected by the First Amendment. The CPC found that neither Dunn's memorandum to Young nor his efforts to disclose confidential memoranda to the press or to a fellow teacher related to a matter of public concern. The trial court, ***exercising its independent judgment***, adopted these findings, and the Court of Appeal affirmed that decision, again using its independent review. (App., pp. 137-138.)

In evaluating the First Amendment rights of public employees, the threshold inquiry is whether the statements at issue address a matter of "public concern." (*Roe v. City and County of San Francisco*, 109 F.3d 578, 584 (9th Cir. 1997).) If the statements do not address a matter of public concern, then the First Amendment is not triggered at all, and "it is unnecessary . . . to scrutinize the reasons" for the employer's actions. (*Connick v. Myers*, 461 U.S. 138, 246, 103 S. Ct. 1684, 75 L. Ed. 843 (1983)).

Because Dunn's conduct was not protected by the First Amendment, the Court of Appeal did not have to analyze Dunn's dismissal in light of the factors set forth in *Mt. Healthy, supra*, and *Umbehr, supra*.

Third, the CPC also held that Dunn's claims under the First Amendment had already been addressed by Arbitrator Perea who held that Dunn's speech was not protected. (App. pp. 11-12, n.5; and pp. 56-83, generally.) Since Dunn never challenged this legal determination, under California law Arbitrator Perea's decision was entitled to the preclusive effects of res judicata and collateral estoppel. (*Lyons v. Security Pac. Nat. Bank*, 40 Cal. App. 4th 1001, 1015, 48 Cal. Rptr. 2d 174 (1995).) The CPC adopted Arbitrator Perea's ruling which was then subsequently adopted by the Superior Court.

The effect of res judicata and collateral estoppel in this case was to establish, as a matter of law, that Dunn's speech was not protected speech under the First Amendment. Therefore, under *Connick v. Myers, supra*, the First Amendment was not "triggered" at all in Dunn's dismissal, and "it is unnecessary . . . to scrutinize the reasons" for the employer's actions. (*Connick v. Myers, supra*, 461 U.S. at 246, 103 S. Ct. 1684, 75 L. Ed. 843.) Consequently, Dunn should be prevented, by principles of res judicata and collateral estoppel, from even raising this issue before this Court.

This Court is required under 28 U.S.C. § 1738 to give full faith and credit to the decision of the California courts with regard to the issues which were fully and fairly litigated in the arbitration before Arbitrator Perea. (*Parsons Steel Inc. v. First Alabama Bank*, 474 U.S. 518, 515, 106 S. Ct. 768, 88 L. Ed. 2d 877 (1986).)

Finally, Dunn asserts that the Court of Appeal erred in not reviewing the trial court's decision using its independent judgment. Dunn fails to cite to any portion of the Court of

Appeal decision which actually establishes that the Court of Appeal failed to independently review Dunn's First Amendment claims. As demonstrated in the Statement of the Case, *infra*, the Court of Appeal exercised its independent review of Dunn's First Amendment claims. Perhaps the best evidence of the Court of Appeal's use of independent judgment arose when the Court of Appeal did not automatically adopt the CPC or Superior Court's determination that Dunn's speech was not protected, but instead assumed, for the sake of analysis, that Dunn's speech was protected by the First Amendment. Such an analysis reveals that the Court of Appeal exercised its independent judgment. (App., p. 135.)

## II.

## DUNN WAS AFFORDED DUE PROCESS

Dunn next challenges the Court of Appeal decision on the basis that he was not given fair notice that his conduct with regard to Nancy could lead to discipline. The charges against Dunn with regard to Nancy included immoral conduct, evident unfitness for service and dishonesty. The Court of Appeal held that the Statement of Charges against Dunn was sufficient to notify him of the actions which subjected him to discipline, and to provide him with sufficient knowledge to prepare a defense. (App., pp. 127-133.)

Dunn essentially asserts that he had no way of knowing that his relationship with Nancy could have resulted in his dismissal because he had maintained other relationships with students and was not warned that such relationships would subject him to discipline. This contention is wholly meritless for two reasons.

First, Dunn's relationship with other students was never in question during his dismissal hearings. He only had to answer for his relationship with Nancy. As the CPC, the Superior Court, and the Court of Appeal all found, Dunn's relationship with Nancy was so imbued with immoral conduct that any reasonable teacher would have known his conduct was unacceptable and could subject him to discipline. For example, it can hardly be argued that a teacher who threatens to kill a student's boyfriend and family has not engaged in conduct for which he could be disciplined. Dunn, who engaged in exactly this conduct, could not be unaware of the potential disciplinary sanctions arising from such conduct. Indeed, as the Court of Appeal noted, Dunn took steps to conceal his actions, and even his relationship with Nancy, which indicated that Dunn knew, before charges were ever filed against him, that his conduct was inappropriate and would subject him to sanctions. (App., pp. 128-129.)

Second, Dunn asserts that the CPC dismissed him on the basis of conduct which was allegedly not set forth in the District's Statement of Charges. (App., pp. 149-166.) However, Dunn fails to cite even a single cause for his dismissal which was not reasonably contemplated and included within the Statement of Charges against him. (Compare Statement of Charges, App., pp. 149-166, with CPC Decision, App., pp. 1-83.)

Third, Dunn was not only dismissed on the basis of conduct in his relationship with Nancy, but he was also dismissed for his dishonesty, and abusive and insubordinate conduct toward Tieri and Young. Dunn does not, and logic dictates that he cannot, assert that he had no way of knowing that dishonesty, and his personal threats and aggression

toward his supervisors would not be grounds for discipline. Indeed, as the record reflects, Dunn was repeatedly warned that his conduct toward Tieri and Young could and would lead to discipline, and he was even suspended five days for such conduct prior to the date on which he was served with the Statement of Charges which led to his dismissal. (App., pp. 11-14, Finding 6.)

## CONCLUSION

The Petition before this Court is meritless. While allegedly presenting this Court with valid issues for review, an analysis of these issues reveals only that Dunn is disappointed in not being believed. Fortunately, disappointment with a result is not a sufficient reason to warrant this Court's review. Consequently, the District respectfully requests this Court to deny Dunn's Petition.

Respectfully submitted,

NICHOLAS T. CALDERON
*Counsel of Record*
WARREN S. KINSLER
ATKINSON, ANDELSON,
LOYA, RUUD & ROMO
*Attorneys for Real*
*Party in Interest*
11440 West Bernardo Court
Suite 174
San Diego, California 92127
(619) 485-9526